

EXHIBIT 5

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 ANNE DE LACOUR, ANDREA WRIGHT, and
6 LOREE MORAN, individually and on
7 behalf of all others similarly situated,
8 Plaintiffs,

9 -against-

10 COLGATE-PALMOLIVE CO., and TOM'S OF
11 MAINE INC.,

12 Defendants.

13 Case No. 1:16-cv-08364-KMW

14 -----x

15 (Via Zoom Videoconference)

16 September 9, 2022

9:36 a.m. Eastern

17
18
19 Video-recorded Videoconference

20 Deposition of COLIN WEIR, before Kristi Cruz,
21 a Stenographic Reporter and Notary Public of
22 the State of New York.

1 C. WEIR

2 A. Again, having not seen the
3 plaintiffs' testimony, I can't answer the
4 question.

5 Q. Well, you can answer it -- I'll
6 repeat the question: Sitting here today, do
7 you know whether plaintiffs' testimony is
8 consistent with the opinions stated in your
9 report?

10 MS. WESTCOT: Objection. Asked and
11 answered.

12 A. Having not seen that testimony, I
13 don't know the answer.

14 Q. Let's step back a little bit.
15 What's your birthday?

16 A. October 29th.

17 Q. Of what year?

18 A. 1980.

19 Q. And where did you attend high
20 school?

21 A. The Waring School.

22 Q. Where is that located?

23 A. Beverly, Massachusetts.

24 Q. What year did you graduate high
25 school?

1 C. WEIR

2 A. 1999.

3 Q. And did you go to college straight
4 after high school?

5 A. There was a brief break in between,
6 but yes.

7 Q. How long was the break?

8 A. Two, three months.

9 Q. Okay. And where did you go to
10 college?

11 A. The College of Wooster, Wooster,
12 Ohio.

13 Q. And when did you begin college, what
14 year?

15 A. 1999.

16 Q. And what year did you graduate?

17 A. 2003.

18 Q. And what was your major?

19 A. Business economics.

20 Q. Do you have any other majors?

21 A. No.

22 Q. Any minors?

23 A. No.

24 Q. Do you have any concentration within
25 your major of business economics?

1 C. WEIR

2 A. Well, business was a concentration
3 of economics more broadly.

4 Q. I see. So it was a degree -- okay.
5 So it was a major in economics with a focus in
6 business?

7 A. They issue a separate degree called
8 business economics. It is part of the
9 economics curriculum, and it's focused on
10 studying how businesses behave, what they do,
11 tools that they use, and kind of skips some of
12 the more -- sometimes say macro economy, but
13 that maybe isn't the right term. But some of
14 the curriculum like labor economics that just
15 isn't relevant when you're going into the
16 business field.

17 Q. When you were in undergrad, did you
18 take any classes in retail pricing?

19 A. I don't think there was a class
20 titled "retail pricing," but how to price
21 goods was definitely part of the curriculum.

22 Q. How so?

23 A. We studied how businesses set
24 prices, different strategies that you might
25 employ, the consequence of various choices,

1 C. WEIR

2 like if a product exists, it's going to be
3 better to sell it than to refuse to sell it if
4 you're a profit-making enterprise.

5 Q. Do you remember the names of the any
6 of the classes where you learned those things?

7 A. Yeah, we're going back more than 20
8 years now. I just don't remember the class
9 names.

10 Q. Are you specifically relying on your
11 undergraduate education for providing the
12 opinions in your report?

13 A. I have 19 years of professional
14 experience, and I would say that I generally
15 bring my professional experience and
16 educational experience to bear as part of what
17 I do in my work. There's no class where I
18 would say, aha, for Tom's of Maine I'm going
19 to go back to Econ 203 and rely on what I was
20 taught in that class.

21 But to the extent that my experience
22 has been formed by attending those classes and
23 then subsequently using those skills for 19
24 years professionally, I suppose that there's
25 probably some foundation that started in

1 C. WEIR

2 undergraduate.

3 Q. Okay. Now, after undergraduate, did
4 you go straight to graduate school?

5 A. No.

6 Q. What did you -- do you recall how
7 long it was between undergraduate and graduate
8 school?

9 A. About four years.

10 Q. And what did you do during those
11 four years?

12 A. I concluded my work at Stop & Shop
13 Supermarkets and began my work at Economics
14 and Technology, Inc.

15 Q. So let's back up for a second.
16 Did you work at Stop & Shop while
17 you were in undergraduate?

18 A. Yes.

19 Q. Okay. What year did you begin
20 working at Stop & Shop?

21 A. 1996.

22 Q. So you were in high school when you
23 began working at Stop & Shop?

24 A. That's correct.

25 Q. Okay. What year of high school did

1 C. WEIR

2 you begin working at Stop & Shop?

3 A. That probably would have been my
4 sophomore year.

5 Q. And did you continue working at
6 Stop & Shop while you were in undergraduate?

7 A. Yes.

8 Q. So your high school was in
9 Massachusetts and your college was in Ohio,
10 correct?

11 A. Yes.

12 Q. Did you work at the same store
13 during that time period, or did you change
14 stores?

15 A. I worked at different stores
16 throughout my tenure at Stop & Shop.

17 Q. When you were in high school, did
18 you work in multiple Stop & Shop stores?

19 A. Yes.

20 Q. Which was the first Stop & Shop
21 store you worked at?

22 A. My home base was Store 32 on Enon
23 Street in Beverly.

24 Q. That's Beverly, Massachusetts?

25 A. Yes.

1 C. WEIR

2 Q. From what year to what year did you
3 work at Store 32?

4 A. I worked on and off at Store 32
5 throughout the entire time I was employed at
6 Stop & Shop.

7 Q. I'm just trying to understand how
8 this all fits together. So you graduated high
9 school in 1999, correct?

10 A. Yup.

11 Q. Okay. And you began college in Ohio
12 also in 1999, correct?

13 A. That's right.

14 Q. And you graduated college in 2003,
15 correct?

16 A. Yes.

17 Q. And what year did you begin your
18 graduate studies?

19 A. 2007.

20 Q. And I apologize, I know you just
21 said this, it's just hard for me to keep years
22 straight: What year did you begin working at
23 Stop & Shop?

24 A. 1996.

25 Q. And that would have been your

1 C. WEIR

2 sophomore year of high school?

3 A. I think so.

4 Q. And you worked at Store 32 from 1996
5 through 1999 while you were in high school,
6 correct?

7 A. I didn't stop working at Store 32 in
8 1999, but I did work there through that date
9 range, yes.

10 Q. So while you were a full time high
11 school student, you were -- well, let me step
12 back. I don't want to assume.

13 Were you a full time high school
14 student from 1996 to 1999?

15 A. Unlike for college or graduate
16 studies, I'm not aware of there being
17 part-time high school. So I guess I would
18 describe that I went to what I understand to
19 be a normal high school.

20 Q. Okay. That's fine. You'd be
21 surprised at the accommodations that they make
22 sometimes today.

23 A. Different era.

24 Q. Yeah.

25 Okay. So you were a full time high

1 C. WEIR

2 school student and you were working at Stop &
3 Shop Store 32 from 1996 to 1999, correct?

4 A. Subject to the caveat that I gave
5 you before, yes.

6 Q. I'm not saying you stopped working
7 in 1999 at that store, I'm saying during those
8 years, that's where you worked and you were a
9 high school student, correct?

10 A. Yes.

11 Q. And then when you moved to Ohio for
12 college, did you continue working at Store 32?

13 A. Sometimes.

14 Q. When?

15 A. I worked at Store 32 on and off
16 through the remainder of my career with Stop &
17 Shop.

18 Q. So you were in college in Ohio, but
19 Store 32 is in Massachusetts. Do you mean you
20 worked when you were back on breaks, summer
21 break, winter break, things like that?

22 A. I'd work at Store 32 over the
23 summer, holiday breaks, occasionally I would
24 go home, I would work.

25 Q. Were you a full time college student

1 C. WEIR

2 from 1999 to 2003?

3 A. Yes.

4 Q. So you worked at Store 32 when you
5 were home from college. Which store did you
6 work in when you were in Ohio as a college
7 student?

8 A. So I was not working at a store when
9 I was in Ohio.

10 Q. I see. So your only work for Stop &
11 Shop from 1999, when you began college,
12 through 2003, when you finished college, was
13 part-time work at Store 32 when you were home
14 for weekends and holidays and breaks?

15 A. I would also do remote work for the
16 store.

17 Q. For Store 32?

18 A. I can't guarantee that it was
19 exclusively for Store 32, but generally, yes.

20 Q. Okay. What was the nature of the
21 remote work you performed while you were in
22 college?

23 A. Some of it related to pricing at the
24 store, and some of it related to sales
25 forecasting at the store.

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Q. What title did you hold at the time you performed this remote work?

A. That's a good question. I think at the time I was the price-file maintenance head, but I wouldn't swear my life on that.

Q. Well, there are three titles that you list in your report as positions you held at Stop & Shop. Grocery/receiving clerk, cash department head, and price-file maintenance head.

Does that refresh your recollection as to what title you held while performing this remote work in college for Stop & Shop?

A. That does not give me a better sense than the answer I've already given.

Q. I mean, do you have any expectation as to whether a grocery and receiving clerk performs remote work and sales forecasting?

A. The title that I held was not always related to the work that I would do. I had, I guess I would say, unusual merit at the store and unusual drive to succeed, and so I was given tasks that were sometimes beyond my role, which is why I can't remember whether at

1 C. WEIR

2 the time I had been given the title of
3 price-file maintenance head yet or not.

4 Q. Have you ever discussed the nature
5 of your work as a grocery/receiving clerk and
6 a cash department head and a price-file
7 maintenance head during depositions in other
8 cases?

9 A. Probably.

10 Q. And during any of those depositions,
11 have you ever mentioned this remote work for
12 sales forecasting and pricing at the store
13 during college?

14 A. Going back to depositions starting
15 in 2007, I don't recall.

16 Q. So for this -- you said remote work.
17 Can you just explain what you mean by the,
18 quote, "remote work" that you performed while
19 you were in college?

20 A. My capstone research project in
21 college dealt with sales forecasting at
22 supermarkets, which is something that I had
23 begun to experience at my job. And so I did
24 some work with the store and the store manager
25 to help with the forecasting and to get a

1 C. WEIR

2 better understanding of it. And then as part
3 of my research at school, I was integrating my
4 work at the job with academic research as to
5 whether or not there were better methods to
6 conduct the sales forecasts that are required
7 of store managers at Stop & Shop supermarkets.

8 Q. What was the store manager's name?

9 A. Dominique Gabriel.

10 Q. Do you have Mr. Gabriel's contact
11 information on you?

12 A. It's a she. I have not been in
13 touch with her in many years. I understand
14 that she still works for the company, but no
15 longer at Store 32, but I don't have a contact
16 information.

17 Q. And this capstone research project,
18 was that supervised by a professor?

19 A. Yes.

20 Q. What was the professor's name?

21 A. Allison Wellington and John Sell.

22 Q. How do you spell their names?

23 A. Allison, I think with two Ls and an
24 I. I think there's only one Wellington.

25 Q. Yeah.

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A. And John as you would expect, and Sell is S-E-L-L, to the best of my memory.

Q. Did you receive a grade on this capstone research project?

A. It wasn't graded in the traditional sense. It was a mandatory project for which you needed to pass in order to graduate, which I did.

Q. Was it high pass, low pass, or just pass/fail?

A. To the best of my memory, you either got satisfactory or unsatisfactory, and mine was deemed satisfactory.

Q. Okay. When you were performing this remote work, what was your means of communication with the store? Was this -- I mean, this was pre-Zoom.

A. Again, we're going back 20-plus years. My recollection would have been we were speaking by landline telephone.

Q. You sent letters back and forth, or just on the phone?

A. I think on the phone.

Q. What specifically did you discuss

1 C. WEIR

2 with the store manager from Stop & Shop
3 Store 32 as part of your capstone research
4 project?

5 A. I don't have the specifics of the
6 conversation 20-plus years later. I can tell
7 you generally, like I already have, that I was
8 understanding the requirement that store
9 managers had to produce weekly forecasts of
10 what they expected the business to be like at
11 the store, and they -- the store managers were
12 not given training in how to do that, nor were
13 they given any real economic tools to make
14 those forecasts. And it occurred to me that
15 there were actually good tools to do forecasts
16 and better ways to be accurate, and since the
17 managers could be penalized for being
18 inaccurate, I thought it would be interesting
19 to study the method that they used and whether
20 or not there were better methods to apply to
21 the data from the store to try and more
22 accurately predict the weekly sales.

23 Q. Were you compensated by Stop & Shop
24 for your work with the store manager, or were
25 you just helping this person out?

1 C. WEIR

2 A. I was not compensated for my
3 academic research. But part of what I was
4 doing was assisting the manager with
5 forecasting when I was discrete work that was
6 for Stop & Shop and not for my academics, I
7 was paid the normal hourly rate for my work.

8 Q. And do you recall what the normal
9 hourly rate for your work was at that time?

10 A. I think it was embarrassingly low,
11 but I don't know the exact rate. Let's just
12 say that I'm lucky I didn't end up with a
13 lifetime career of working at Stop & Shop.

14 Q. Okay. You said it occurred to you
15 that there were actually good tools to do the
16 forecasts and better ways to be accurate. Do
17 you recall what tools you suggested that the
18 store manager use?

19 A. The primary tool that I thought
20 would be helpful would be regression analysis.

21 Q. What do you mean by regression
22 analysis?

23 A. Like an ordinary leased squares
24 regression that looks at the relationship
25 between one dependent variable and one or more

1 C. WEIR

2 independent variables.

3 Q. What year of college was this that
4 you were working on this capstone project?

5 A. It would have begun probably 2002,
6 would be my best guess.

7 Q. So junior year of college?

8 A. I think the end of the junior year,
9 and then all throughout senior year.

10 Q. Okay. I hate to poke on this point,
11 but you say your salary at the time,
12 compensation from Stop & Shop was
13 embarrassingly low. Do you recall if it was
14 above or below \$10 an hour?

15 A. I think it was above \$10 an hour.

16 Q. Above or below \$20 an hour?

17 A. I don't recall.

18 Q. But you're not sure whether it was,
19 you know, \$9.50 or \$12, you don't recall
20 specifically?

21 A. It's been so long, I just don't
22 remember.

23 Q. So what information did you -- you
24 said you help with pricing at the store as
25 part of your remote work, right?

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C. WEIR

the high school time, that could be true, too.

Q. Do you have any understanding as to the approximate number of times you were asked to fill in at other Stop & Shop stores?

A. I don't have a memory.

Q. So other than the remote work you performed for Stop & Shop while in college, is it fair to say that your other work experience at Stop & Shop was in store?

A. I'm sorry, I lost track of the question. Would you ask it again, please?

Q. Sure. So other than the remote work you performed for Stop & Shop while in college, is it fair to say that your remaining work experience at Stop & Shop was in-store work?

A. As a lawyer, you should probably be aware that asking whether things are fair is a subjective analysis and you may be better off asking whether something is accurate or true and correct. But it is correct that the vast majority of my work for Stop & Shop was conducted in one of their retail stores.

Q. That's not quite my question,

1 C. WEIR

2 though. So you previously discussed the
3 remote work you performed for Stop & Shop
4 while in college, correct?

5 A. Yes.

6 Q. Other than that work, did you do any
7 work for Stop & Shop that was not in-store
8 work?

9 A. I don't have a perfect memory of
10 that, but the vast majority of the work that I
11 did was conducted in a retail store.

12 Q. As you sit here today, other than
13 the remote work from college that we
14 previously discussed, do you recall any work
15 you did for Stop & Shop that was not conducted
16 in a retail store of Stop & Shop?

17 A. Going back 20-plus years, I don't
18 have a memory one way or the other.

19 Q. Do you recall the store numbers or
20 locations of any of the other stores you
21 worked in as part of this fill-in work that we
22 were discussing?

23 A. As I testified just a moment ago,
24 no, I do not.

25 Q. Okay. In paragraph 1 of your

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C. WEIR

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report, it notes that you worked as a cash department head and grocery/receiving clerk and price-file maintenance head. Did you hold any other positions at Stop & Shop?

A. Those are the official titles that I held, but as I indicated, I was basically willing to help out however the store needed, and I was interested in both learning and proving myself as a capable person. So there are definitely other tasks that I performed that would fall outside of those titles.

Q. Okay. Now, while you were at Stop & Shop, did you move sequentially from title to title, or did you ever hold multiple titles at once?

A. I think I only ever held one title. But like I said, the title didn't dictate that I would only work in the one category.

Q. Well, in paragraph 1 of your report you list three titles; cash department head, grocery/receiving clerk, and price-file maintenance head, correct?

A. Yes.

Q. So are the only titles you held

1 C. WEIR

2 while working at Stop & Shop, correct?

3 A. To the best of my recollection, yes.

4 Q. And do you recall at any point
5 holding more than one of those three titles at
6 the same time?

7 A. I don't have a memory, but I don't
8 believe so.

9 Q. Do you recall which title you held
10 first?

11 A. Cash department head.

12 Q. So you began work as a cash
13 department head in 1996, sophomore year of
14 high school?

15 A. To the best of my recollection, yes.

16 Q. And which title did you hold second?

17 A. Grocery/receiving clerk.

18 Q. And do you recall approximately when
19 you took on that title?

20 A. No, I do not.

21 Q. Do you recall whether you were still
22 in high school when you acquired that title?

23 A. I don't have a memory one way or the
24 other.

25 Q. To the best of your recollection, at

1 C. WEIR

2 some point in high school or college maybe,
3 you transitioned from cash department head to
4 grocery/receiving clerk?

5 A. Yup, sometime between 1996 and 2003
6 I made that transition.

7 Q. And do you recall approximately when
8 you transitioned to price-file maintenance
9 head?

10 A. No, I do not.

11 Q. So as you sit here today, you
12 have -- let me back up.

13 Did you consider the move from cash
14 department head to grocery/receiving clerk to
15 be a promotion at the time?

16 A. I don't know. I mean, they were all
17 jobs within the store, and I wasn't going to
18 be the store manager, so maybe you could view
19 it as a lateral move. It had different types
20 of responsibilities. Instead of being
21 responsibility for the money at the front, I
22 was responsible for the goods coming in in the
23 back.

24 Q. Was there a difference in salary
25 from cash department head to grocery/receiving

1 C. WEIR

2 clerk?

3 A. I was never on salary at Stop &
4 Shop.

5 Q. How were you compensated?

6 A. Hourly.

7 Q. Was there a change in your hourly
8 compensate rate when you transitioned from
9 cash department head to grocery/receiving
10 clerk?

11 A. I don't remember.

12 Q. And what about when you transitioned
13 from grocery/receiving clerk to price-file
14 maintenance head, was there a change in your
15 hourly compensation then?

16 A. I don't remember.

17 Q. Do you recall at any point what your
18 hourly compensation rate was when you worked
19 at Stop & Shop?

20 MS. WESTCOT: Objection. Asked and
21 answered.

22 A. I mean, at some point it was going
23 to be in the high single digit dollars per
24 hour, and then at some point that grew into
25 the double digit dollars per hour. But beyond

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C. WEIR

that, I don't have a precise recollection.

Q. Do you have any understanding as to why your hourly compensation increased during your time at Stop & Shop?

A. I don't have a perfect memory, but I believe that I continued to prove that I had merit within the store, and so within the boundaries of what they were allowed to do, I was continually given raises over the course of time.

Q. So you previously described the cash department head as having responsibility for the money in the front. What did you mean by that?

A. The cash department head generally is in charge of the register area and monitoring cashiers, the customer experience, and then literally collecting -- I mean, I don't know how much people pay cash for groceries anymore, but back then, a lot of the business was cash, so you'd go around and you'd make sure that you collected cash from the registers and turned it in to the cash office for counting and processing, and then

1 C. WEIR

2 monitoring and auditing cashier cash drawers
3 to make sure that they weren't stealing and
4 were conducting transactions accurately. I
5 think there could be more nuance to your
6 deposition about Tom's of Maine, but now we're
7 talking about cash drawers at Stop & Shop.
8 You tell me what you want to hear about.

9 Q. I take it you feel that your cash
10 department head experience is not particularly
11 relevant to your opinion in this case?

12 A. Never say never, but I don't think
13 I'm relying on, you know, auditing of
14 cashier's drawers for my opinions in this
15 case.

16 Q. And you also described your time as
17 a grocery/receiving clerk as being responsible
18 for the goods coming in the back. What did
19 you mean by that?

20 A. As a receiving clerk, products come
21 into the store at the highest level in two
22 broad categories. The we would order things
23 from Stop & Shop, and then Stop & Shop would
24 deliver a tractor-trailer full of products.
25 And so I would be responsible for ordering,

1 C. WEIR

2 tracking inventory, and then either literally
3 bringing the products into the store or
4 supervising somebody else doing that.

5 The other category is that products
6 are brought in by vendors. Like Coca-Cola
7 sits on the same shelf as Stop & Shop soda,
8 but we are responsible for putting the store
9 brand soda up on the shelf, a guy from Coke
10 brings their own product into the store and
11 puts the product on the shelf. But you need
12 to be careful to track the products that they
13 bring in, anything that's damaged or things
14 that you need credit for. And so those were
15 all parts of the things that I would do, as
16 well.

17 Q. In terms of ordering inventory, as a
18 grocery/receiving clerk, how did you know how
19 much inventory to order?

20 A. That's something you learn while
21 you're on the job. And as I was there, the
22 technology was improving, so we would have
23 what to a layperson would probably be
24 described as a scan gun. I think the
25 technical term was like a Telxon or something

1 C. WEIR

2 like that. So I would scan a product or a
3 barcode or the shelf tag, and it would say you
4 should see four units on the shelf and you
5 should have a case in the back, and typically
6 you use about a case per week, and then based
7 on that information you decide, okay, I'll
8 order another case or I'll wait until next
9 week and then bring in another case.

10 Q. I see. So the technology and the
11 scan gun tracked your inventory and let you
12 know when it was time to reorder inventory?

13 A. I don't think it said please
14 reorder. It would provide information that
15 would be the basis of somebody making a
16 decision to reorder.

17 Q. I see. So it would tell you how
18 much you had in inventory, and you would then
19 make a subjective determination whether the
20 inventory was low and you needed more?

21 A. It would tell us the expected
22 inventory, and it would give some statistics
23 about the estimated velocity or throughput of
24 the inventory.

25 Q. I see. And so based on that

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information, you would deduce when to order more product?

A. Right. And you'd have to bring some amount of -- some amount of your expertise to bear on that. I remember there was a product that people want all the time I think around Thanksgiving. I remember people asking for Major Grey's Chutney. In that week, you might sell a whole case, and then for the entire rest of the year, you might sell three bottles.

Q. Okay.

A. So you had to kind of understand the products within the store.

Q. Got it.

Do you know whether Stop & Shop still uses a similar inventory management process system?

A. Today?

Q. Yeah.

A. I don't have any idea.

Q. Okay. Out of the seven years you spent working at Stop & Shop, do you have any understanding as to approximately how many of them were spent as a cash department head?

1 C. WEIR

2 A. Again, I don't have a precise
3 recollection of how the times worked. If I
4 had to guesstimate, I would say it was roughly
5 thirds. But again, even when my title
6 shifted, the roles and responsibilities, you
7 know, while I was doing the pricing at the
8 store, they might say, hey, the receiving
9 clerk is out sick this week, can you work the
10 receiving desk, and I would say of course I
11 can do that.

12 Q. When you were a grocery/receiving
13 clerk, did anyone report directly to you?

14 A. Several grocery clerks, yes.

15 Q. Other grocery clerks reported to
16 you?

17 A. Yes.

18 Q. Approximately how many?

19 A. A handful, but I don't have a
20 precise recollection.

21 Q. Do you recall their names?

22 A. At this point, no.

23 Q. Did you report to anyone when you
24 were a grocery/receiving clerk?

25 A. I reported both to the grocery

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C. WEIR

department head and to the store manager.

Q. When you were grocery/receiving clerk, do you recall approximately how many other grocery receiving clerks worked in that store?

A. There were usually at least two, so that you would have full coverage over the whole day and the whole week. But at any given time, I don't know that I can tell you that maybe there were three; I don't know.

Q. Okay. And in your understanding, was that a typical number of grocery receiving clerks for a Stop & Shop store?

A. Yeah, there was usually, like, one or two people, I think, at most stores. Not going to say that you couldn't have a store that had a different setup. But I think you asked if that was typical; I think that would be typical.

I can't hear you, I'm sorry.

MS. WESTCOT: I can't hear you either. It looks like your audio is reconnecting.

THE VIDEOGRAPHER: Would you like to

1 C. WEIR

2 go off while we fix this, counsel?

3 MR. WEISBERG: Okay. Can you hear
4 me now?

5 THE WITNESS: Now you're back.

6 MR. WEISBERG: I have no idea why
7 the audio dropped out.

8 THE WITNESS: It's okay.

9 BY MR. WEISBERG:

10 Q. Let me just ask the question again
11 because I didn't hear your answer:

12 In your understanding, was that a
13 typical number of grocery receiving clerks for
14 a Stop & Shop store?

15 A. What I had said is, I think it would
16 be regular to have one or two clerks. There
17 could be stores that had a different setup,
18 but yes, I think that would be typical, at
19 least in the era when I was there.

20 Q. Okay. And in the era that you
21 worked at Stop & Shop, do you have any
22 understanding as to how many Stop & Shop
23 locations there were in the United States?

24 A. Dozens and dozens, if not hundreds.

25 Q. Okay. And when you were a cash

1 C. WEIR

2 department head, how many cash department
3 heads were there at your Stop & Shop store?

4 A. That I don't have a precise
5 recollection of, but it would be a bigger
6 number.

7 Q. Five cash department heads? Ten?

8 A. I don't know, I don't know.

9 Q. But more than two per store?

10 A. Oh, yeah, because the register area
11 has to be covered at all times. So you might
12 have two people on staff for any given shift.

13 Q. I see. In your understanding, it
14 was a regular number of cash department heads
15 for a typical Stop & Shop store to have at the
16 time?

17 A. Well, you say that was the number.
18 I haven't given you a number because I don't
19 recall, but I think our store was typical in
20 terms of given the size of the store. Where
21 at a bigger store you might have more and a
22 smaller store you might have less, we had a
23 typical stable of cash department heads.

24 Q. Now, as a price-file maintenance
25 head, do you have any understanding as to

1 C. WEIR

2 whether you ever held that title, price-file
3 maintenance head, while you were working in a
4 physical Stop & Shop store?

5 A. I'm positive that I was working
6 physically in the store while I had that
7 title.

8 Q. What were your responsibilities as a
9 price-file maintenance head?

10 A. I was responsible, generally, either
11 myself or through other folks, for changing
12 and setting prices within the store.

13 Q. What do you mean by "changing and
14 setting prices within the store"?

15 A. So we're going to increase the price
16 of tomatoes for whatever reason. I would
17 print out a list of price changes that would
18 happen in the produce department, and I would
19 deliver them to the produce people and say,
20 you know, within the next two days I need you
21 to adjust the prices and your signage and
22 everything like that. And then I would have
23 responsibility for the computer system that
24 would correlate either a UPC or PLU or other
25 product identifier with the price that would

1 C. WEIR

2 ring up when somebody scanned it at the
3 register, and also matching those things with
4 discounts or sales or promotions. So it might
5 ring up 2.99 if you just scan the item, and if
6 you have a loyalty card, it might ring up
7 2.49, something like that.

8 Q. So as the price-file maintenance
9 head, how did you come to learn that, for
10 instance, the price of tomatoes was going to
11 be decreased?

12 A. Sometimes that's a decision that we
13 would make in the store, sometimes we would be
14 told that there's going to be a promotion, so
15 that kind of information would come by
16 computer.

17 Q. And was it your understanding that
18 the promotion information coming by computer
19 was sent from Stop & Shop corporate?

20 A. I think there are varying degrees.
21 I think sometimes there would be a store-wide
22 promotion, so that would probably come from
23 corporate. I had discretion to adjust prices.
24 Sometimes the store manager would make
25 promotional decisions that I don't think were

1 C. WEIR

2 tied to corporate.

3 Q. So what instances did you have
4 discretion to adjust prices?

5 A. I'll give you just one example.
6 Technically, I think I could have adjusted any
7 price within the store. But if we had
8 inventory that was going to perish or expire,
9 I could adjust the price downward in order to
10 try and move the product before the product
11 would go to waste. At the grocery store,
12 there's a principle that you want to get
13 literally any money you can for a product
14 rather than zero money for the product, even
15 if you wind up taking a loss on the sale. So
16 I think that's one category.

17 Q. So you said you could have adjusted
18 any price within the store. I understand that
19 functionally if you're the person in charge of
20 the barcode system, you could put in whatever
21 price you want. But I just want to be clear:
22 Is it your testimony that you had unfettered
23 discretion to reduce any price of any product
24 in the store however you saw fit?

25 A. So I would say that in order to get

1 C. WEIR

2 the position, you have to prove that you have
3 the discretion to do that appropriately. So
4 yes, I think that I could have adjusted any
5 price in the store, but I would not just do
6 that willy-nilly, and that part of the
7 responsibility of the position was only
8 adjusting prices as necessary or in
9 consultation with a manager or within
10 circumstances that were generally understood
11 to be prudent, like this pile of steaks is
12 going to expire tomorrow, we want to make sure
13 that we sell them and get some money rather
14 than have to throw them away.

15 Q. Okay. So other than the instance
16 of, you know, soon-to-expire food, were there
17 other particular instances in which you were
18 permitted to lower prices in the store?

19 A. Yeah, we would occasionally have an
20 offer from, like, Coke, if you buy an entire
21 trailer of product, we'll give it to you at an
22 enormous discount, and that would then permit
23 us to sell, like, two liters for below the
24 regular price while we would maintain that
25 inventory. So in concert with other people in

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C. WEIR

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the store, there would be times like that

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where there would be pricing adjustments that

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would be made based on ordering and inventory

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and other factors like that.

6

Q. You said that would be in concert

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with other people in the store. That wasn't a

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decision that you had the authority to

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personally make on your own, to just order an

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entire trailer of Coke and then reduce the

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price?

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A. Well, when I was the

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grocery/receiving clerk, I could decide to

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bring in a trailer of Coke. But at the time,

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then, I wouldn't have been the person who

16

would have been responsible for the other

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portion of it, which was, let's just the

18

pricing, as well.

19

Q. So is it your testimony that as a

20

grocery/receiving clerk, you had unfettered

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discretion to order whatever product you saw

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fit?

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A. Again --

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MS. WESTCOT: Objection. Asked and

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answered.

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A. There's a level of responsibility

that you must prove to have before you take

that type of job. So I think I could have

ordered anything that I wanted to, but there

were just sort of general parameters. Like,

you don't want to be the guy that orders the

trailer of product this then rots away.

Again, are you saying, like, did I technically

have the ability to buy a whole trailer of

product? Yeah, I think so. But that would be

a rare thing that we would actually do that

because there aren't that many things that you

could sell that kind of volume so quickly.

Q. When you were grocery/receiving

clerk, was there a limit on the amount of

money you could spend ordering product without

permission from a manager or someone superior

to you?

A. I don't recall having a fiscal limit

on what I could order.

Q. In terms of, I want to go back to

this pricing. So you said one instance is

perishable food going bad and you had

discretion to lower the price. And then you

1 C. WEIR

2 said another is that in concert with others in
3 the store, you could order a large quantity
4 from a vendor and then discount it based on
5 the price you got from the vendor.

6 Are there any other instances where
7 you had discretion to set prices in the store?

8 A. Like I told you, even though I don't
9 think I would have done it willy-nilly, I
10 could just any price that I saw fit. There
11 are other types of circumstances where that
12 might be common, such as, we're not doing any
13 business this week because everybody's
14 anything to the next door grocery store
15 because they have steak real cheap, so why
16 don't we respond and make sure that we don't
17 lose our entire business for the week because,
18 you know, the loss leader item is taking
19 people to the competitor.

20 Q. Other than perishing goods, are
21 there any other instances where you personally
22 recall reducing a price in your capacity as
23 price-file maintenance head?

24 A. I mean, again, this is 20 years ago,
25 so I don't remember every UPC that I made an

1 C. WEIR

2 adjustment to, and it would happen hundreds of
3 times a week; this one's going up, this one's
4 going down. We would print sheets and sheets
5 and sheets of them because as a practical
6 matter, at least in Massachusetts, you have to
7 label every unit of product with its selling
8 price. So if you're going to take the
9 toothpaste up 20 cents or take the toothpaste
10 down 20 cents, that means somebody's got to go
11 into the aisle, scrape off the old price, mark
12 it again, change the label that's on the
13 shelf. But we would do that with sheets that
14 would be hundreds of products per week.

15 So do I remember the particulars of
16 that? No. But it wasn't just because it was
17 perishable food. There are many categories of
18 things that could cause that to happen; like I
19 said, what the competitors are doing at the
20 store down the street, whether there's a
21 promotion, whether we were able to get
22 favorable terms from the vendor, seasonal
23 things, where we just want to make a
24 particular product -- like you can always find
25 one bottle of eggnog in the store, but at

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C. WEIR

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Christmastime, there's a whole section of

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eggnog, so you adjust the pricing seasonally,

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that sort of thing.

5

Q. Is it your testimony that you

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personally decided how to price hundreds of

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products every single week as a price-file

8

maintenance head?

9

A. I had the ability to change prices.

10

The store manager could ask me to change

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prices. There were things that would come

12

from corporate that would cause prices to

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change. I think all of those categories.

14

Q. Okay. So in your experience working

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at Stop & Shop, were the majority of those

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price changes dictated by corporate, by you,

17

or the manager?

18

A. It was a mix.

19

Q. It was a mix. But in your

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experience, were a majority of the price

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changes, these hundreds of price changes every

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week, dictated by corporate, right?

23

A. I don't have a precise recollection

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other than that they could come from a variety

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of sources, myself included.

1 C. WEIR

2 Q. So as you sit here today, it's your
3 understanding that it's equally likely that
4 out of 100 price changes in a given week, you
5 were making 50 of them and corporate was
6 making 50 of them, or you were making 80 of
7 them and corporate was making 20 of them? You
8 have no concept as to how that breakdown
9 occurred?

10 MS. WESTCOT: Objection to form.

11 A. Part of the problem was it would be
12 different by week. There might be a week that
13 has a huge slate that comes in as things were
14 updated in the store, and then there might be
15 a week where, you know, everything is at the
16 store's discretion depending upon what's going
17 on. Or more likely, that there was a mix.

18 Q. Sitting here today, do you recall
19 any week where you personally set a majority
20 of the price changes implemented in your
21 store?

22 A. I don't have a perfect memory of
23 that, but I do recall that there were weeks
24 where I was making dozens, if not hundreds of
25 manual entries into our system.

1 C. WEIR

2 Q. I'm not asking about who entered the
3 prices, Mr. Weir. I'm asking about who
4 decided what the prices would be.

5 A. Right, I understand that. The
6 corporate changes were -- they were automatic
7 in the sense that the computer would update it
8 when you said we're ready, because we've done
9 the work in the store. But when they're
10 manual, it's a store-level change.

11 Q. Who set -- I know we talked about
12 price changes. But in terms of the normal
13 list price as it were, is that set by
14 corporate or the store?

15 A. I'm not a hundred percent sure how
16 to answer that question. When I inherited the
17 job, I inherited prices that were what they
18 were, and I couldn't tell you, per se, who had
19 been responsible for setting them. From that
20 point on, it was a combination of corporate
21 and store-level changes that would increase or
22 decrease either permanently or temporarily the
23 price of an item.

24 Q. So you worked at Stop & Shop for
25 seven years. Did Stop & Shop ever begin

1 C. WEIR

2 running any new items during that time?

3 A. Possibly. I don't have a
4 recollection of a specific new item.

5 Q. Do you have any understanding as to
6 how the price of new items is set?

7 A. Again, I think there's some amount
8 of discretion. The store might be told where
9 to put the price. The store could also choose
10 a price.

11 Q. So, just taking a random product, a
12 bottle of shampoo, nonperishable product, the
13 regular price of a bottle of shampoo on a
14 shelf in a store, is that set by corporate or
15 is that set by you?

16 A. Again, as I take over the job, the
17 price is what it is. Whether or not it
18 changes as a result of something that I do or
19 that is asked of the store, I don't have a
20 memory on a product-by-product basis.

21 Q. But just generally, with regard to
22 all the products in the store, is the regular
23 price of those products generally set by
24 corporate or generally set by the store?

25 MS. WESTCOT: Objection. Asked and

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C. WEIR

answered.

A. The prices are set by a mix of corporate action and by people at the store level.

Q. So as you sit here today, you have no understanding as to the breakdown between when a corporate sets retail price, like the normal non-sale price, versus the store, for a given product?

MS. WESTCOT: Objection. Asked and answered. Misstates the witness' prior testimony.

A. It is a mix, and in any given week, it could be more of one and less than the other.

Q. Did you ever receive price lists from corporate when you worked at Stop & Shop?

A. I don't know what you mean by a price list.

Q. Did you receive any instructions from corporate listing the items in your store and the prices that should be charged for them?

A. I would sometimes get price changes

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C. WEIR

that were recommended by corporate.

Q. And were you expected to implement those price changes?

A. Unless, in concert with the manager, we decided against, I would, yes, make the changes that were asked of me.

Q. Can you recall any specific instances in which you decided to ignore a price change recommended by corporate?

A. My recollection is that there were times when we would note that the traffic in the store was unusually low, and somebody would scoot down the street to the competitor grocery store and find out that they had some unbeatable deal on something that was causing the foot traffic to go there, because everybody wants to get their paper towels for cheap, and then they do the rest of the grocery shopping at the place they're buying the paper towels. So occasionally we would override whatever the price was and say we don't want to lose our entire business for the week, let's match the loss leader item from down the street.

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C. WEIR

Q. Do you recall specifically reducing the price of paper towels in such a scenario?

A. I don't have specific memory of whether it's paper towels or something else. That was a common one that was a loss leader at the store, so I picked that as an example.

Q. But you don't recall any specific products where, when you worked at Stop & Shop, corporate said charge price X, and you elected to charge a different price, correct?

A. I'm positive that that happened. But if you're asking me to remember from 20-plus years ago the UPCs of the specific products where that happened, I just don't have that in my memory bank.

Q. I'm not sure what you mean by the UPCs. A designation like paper towels would be sufficient or steak would be sufficient.

Do you recall any specific products where Stop & Shop corporate said charge one price and you elected to charge a different price?

MS. WESTCOT: Objection. Asked and answered.

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C. WEIR

A. 20-plus years on, I just don't have a memory of the precise products where that happened, other than the fact that it did.

Q. And do you have any recollection of the specific number of times that that happened, or is that also too far back?

A. I don't have a count. And again, we were changing prices hundreds of times a week, so the details of that, it's just hard to remember.

Q. Do you recall any specific instances in which you unilaterally decided to lower the price for a given item in your store and discount it?

A. I am positive that I did that in my capacity of being in charge of pricing. But if you're going to ask, again, about the specific products, I just don't remember from 20 years ago.

Q. Okay. I mean, do you remember discounting -- applying unilateral -- let me back up.

Do you recall unilaterally deciding to apply a price discount to perishable goods,

1 C. WEIR

2 Q. But you don't recall the last time
3 you did that or the name of the person you
4 spoke with when you did so?

5 A. No. I mean, with the pandemic,
6 we're probably going back several years.

7 Q. Before joining Stop & Shop, had you
8 had any direct experience with setting
9 wholesale prices for consumer packaged goods?

10 A. Before joining Stop & Shop? I don't
11 think so.

12 Q. Okay. I think you would have been
13 in middle school, right?

14 A. Yeah. It seems absurd.

15 Q. Yeah.

16 A. But I wanted to make sure I had the
17 question right.

18 Q. Okay. And similarly, before joining
19 Stop & Shop, had you had any direct experience
20 with setting retail prices for consumer
21 packaged goods?

22 A. I don't believe so.

23 Q. After leaving Stop & Shop, have you
24 had any direct experience with setting
25 wholesale prices for consumer packaged goods?

1 C. WEIR

2 A. I mean, that is a frequent topic of
3 study. Whether you call that direct
4 experience or not, I don't know.

5 Q. Well, have you been involved in
6 setting of prices for -- wholesale prices of
7 consumer packaged goods after leaving Stop &
8 Shop?

9 A. I have consulted with other
10 businesses on that matter, yes.

11 Q. So you left Stop & Shop in 2003.
12 During what years did you work with businesses
13 on setting wholesale prices for consumer
14 packaged goods?

15 A. A large chunk of my 19-year
16 experience at Economics and Technology.

17 Q. What businesses have you worked
18 with?

19 A. We sign nondisclosure agreements
20 with our private clients, so I'm not at
21 liberty to say.

22 Q. I'm going to ask the question again.
23 Unless your lawyer instructs you not to answer
24 on the grounds of privilege, I'm going to ask
25 that you address the question: What

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C. WEIR

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businesses have you worked with in setting
wholesale prices for consumer packaged goods?

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A. Due to the nondisclosure agreements
that I have, I'm not going to answer that
question.

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Q. I'd like the record to reflect that
your attorney is not advising you --
instructing you not to answer. You are just
personally refusing to answer.

11

12

A. I don't have an attorney here. No
one is representing me.

13

14

Q. Ms. Westcot is not? She's been
objecting.

15

16

17

A. She is an attorney. She is
representing the class, the plaintiffs. She
is not representing me.

18

19

Q. We may have to come back and have
this conversation another time, Mr. Weir.

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22

What types of consumer packaged
goods have you been involved with setting
wholesale prices for since 2003?

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A. I'm not even sure I want to get into
that, given that it's potentially deducible
who I'm working for. But I would say at the

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C. WEIR

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highest level, it involves things like grocery store products and things that you could buy at CVS and drugstores, as well as at sort of big box stores that sell a variety of both grocery and non-grocery consumer packaged goods.

Q. Have you been involved in setting wholesale prices for perishable goods?

A. Perishable goods?

Q. Yeah.

A. I don't recall if any of the products were perishable or not. Possibly.

Q. So I assume, then, that the products that you are referring to that you've been involved in setting wholesale prices for are nonperishable consumer goods?

A. I guess maybe we should get a definition out. I mean, even a tube of toothpaste is perishable, right? It expires at some point. So I guess it depends on how you're using the term.

Q. What was your role in the setting of wholesale prices for these goods sold at grocery stores and CVS and big box stores?

1 C. WEIR

2 A. I've provided analytical frameworks
3 and models and analyses that were produced to
4 clients to help them make decisions, including
5 sometimes express advise about the decisions
6 to make, and other times just providing
7 information that the team could use to make
8 their decision about how to price their own
9 products.

10 Q. But you won't tell us any of the
11 businesses that you worked with in that
12 capacity, correct?

13 A. Due not fact that I have
14 nondisclosure agreements that expressly
15 prescribe that, that is correct, I'm not going
16 to give those names away.

17 Q. And you're also not going to testify
18 to the names of the products that you were
19 involved in setting the wholesale prices for,
20 correct?

21 A. I've given you some high level
22 categories. I felt comfortable with that.
23 I'm not comfortable with giving you granular,
24 specific products.

25 Q. And I disagree with your refusal to

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C. WEIR

answer the question, and we may have to come back here and address these, particularly as your counsel has not instructed you not to answer.

After leaving Stop & Shop, have you had any direct experience with setting retail prices for consumer packaged goods?

A. Again, that's a frequent point of study for me. I am, you know, any week I'm not on vacation, studying the retail price of consumer products.

Q. I'm not asking about studying. Before -- I just want to make sure I'm clear: Are you relying on this experience setting wholesale prices for consumer packaged goods for your opinions in this case?

A. I don't think I would point to any one consulting engagement that I'd had in the past and say that informs my opinion for Tom's of Maine, no. But I generally am in the business of understanding the setting of prices of consumer products, and I study it, I read literature about it, I consult with private companies about it, and I work in

1 C. WEIR

2 proceedings such as this, where we estimate
3 how the market would respond and how consumers
4 would behave and how consumers are impacted by
5 the setting of prices.

6 Q. But you are relying on your work
7 with these unnamed companies in wholesale
8 price setting as part of your basis for
9 expertise on which you're offering your
10 opinion in this case?

11 MS. WESTCOT: Objection. Misstates
12 the testimony.

13 A. I think I said I'm not relying on
14 any particular consulting engagement, but I
15 have expertise in these matters, and part of
16 that includes the fact that I have done
17 consulting with companies about their own
18 product development, including how to price
19 it.

20 Q. And even though you believe that
21 your work with those companies informs and
22 supports your expertise, you won't tell us any
23 of their names or any of the products you
24 worked on?

25 A. I am happy --

1 C. WEIR

2 MS. WESTCOT: Objection. Misstates
3 the testimony.

4 A. I am happy to disclaim every one of
5 those consulting projects and say that my
6 opinions stand based on other areas of
7 expertise, and that none of my opinions would
8 change without that knowledge.

9 Q. Okay. Have you also worked with
10 companies in setting the retail prices of
11 consumer packaged goods after you left Stop &
12 Shop?

13 A. As I said, both, yes, and as a
14 frequent point of study for me, how retail
15 prices are set and how the market will respond
16 to various factors.

17 Q. I just -- taking steady aside, I
18 just want to focus on your work with companies
19 setting retail prices. Can you name any of
20 the companies that you have worked with to
21 help set retail prices?

22 MS. WESTCOT: Objection. Asked and
23 answered.

24 A. No, I cannot.

25 Q. You cannot because there are none,

1 C. WEIR

2 you don't know them, or you're bound by NDAs?

3 A. I'm bound by nondisclosure
4 agreements with our private consulting clients
5 to not disclose our relationship with them or
6 the nature of the work.

7 Q. So, on the same grounds, are you
8 unwilling to disclose the specific products or
9 specific types of products that you worked
10 with those companies on to set retail prices
11 for?

12 MS. WESTCOT: Mr. Weisberg, Mr. Weir
13 has already testified that he has
14 confidentiality agreements that are in
15 place that he cannot breach in the
16 deposition today. So the repeated
17 questions about these topics, you've
18 already gotten your answers and you've
19 gotten Mr. Weir's explanation that he's
20 bound by these confidentiality agreements.

21 If you have any further questions
22 about it, I think you need to take it up
23 with the judge and file a motion if you're
24 going to keep pressing on this. I think
25 he's answered your questions today.

1 C. WEIR

2 MR. WEISBERG: This is the last
3 question on that point. I just want to
4 foreclose and be clear that we talked
5 about wholesale pricing and now we're
6 talking about retail pricing, and I just
7 want to a clear record that Mr. Weir is
8 refusing to specify the product that he's
9 worked on with these companies for retail
10 price setting and the companies that he's
11 worked on -- worked with for this retail
12 price setting, on the basis of his
13 nondisclosure agreements. If he says
14 that, we can move on. That was my last
15 question on this.

16 A. Yes, due to the NDAs that have been
17 signed, I cannot give you the specifics of
18 those consulting projects.

19 Q. Okay. And just like with the
20 wholesale projects that you couldn't discuss,
21 are you willing to disclaim your experience
22 and expertise gained from those retail price
23 setting projects?

24 A. I don't know why where this is
25 going. What I will say is, I have enormous

1 C. WEIR

2 knowledge and expertise and background in
3 price setting both at the wholesale and retail
4 level. If you're asking would my opinions
5 change if I hadn't done those consulting
6 projects, I don't think my opinions would be
7 different. Is that part and parcel of the
8 expertise that I bring to the case? I don't
9 know how I can walk away from that. Yes, I
10 have that experience; I bring it to bear. My
11 opinions in Tom's of Maine is not going to
12 change whether or not I had worked for any one
13 particular one of those companies. And I
14 don't say, based on one particular consulting
15 project, my opinion in Tom's of Maine is this.

16 Q. I'm not going to argue with you.
17 I'm just going to -- should I ask the question
18 again or are you aware of the question?

19 A. I don't know that there's a pending
20 question. I just gave an answer.

21 Q. You previously said when we were
22 discussing your experience working with
23 companies to set wholesale prices, quote, "I'm
24 happy to disclaim every one of those
25 consulting projects and say that my opinions

1 C. WEIR

2 stand based on other areas of expertise and
3 none of my opinions would change without that
4 knowledge."

5 Are you willing to make the same
6 statement with regard to your retail price
7 setting project? I would imagine you are.

8 MS. WESTCOT: Objection to form.

9 Asked and answered.

10 A. If somebody asks me in front of the
11 jury what experience do you have, I'm going to
12 mention those things because they are
13 experiences that I've had. But as I just said
14 in my last answer, none of my opinions in
15 Tom's of Maine are driven by any one of those
16 consulting projects. I have general
17 expertise, educational background, and
18 professional training that allow me to give
19 these opinions independent of the consulting
20 projects that I have done, though I believe
21 those consulting projects would be supportive
22 of the opinions that I have in this case.

23 Q. So you're not relying on that
24 consulting experience for your opinions in
25 this case?

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A. I'm relying on my experience generally in this case. That includes those consulting projects. But I didn't say I'm taking a page out of that consulting project to form my opinion in Tom's of Maine.

Q. So you are relying on them, generally, for your opinions in this case?

A. I'm not relying on the consulting projects. I'm relying on the fact that I have 19 years of experience analyzing retail and wholesale pricing.

Q. Let me put it a different way: You contend -- are you standing on that consulting experience as part of the basis for your claimed expertise in this case?

MS. WESTCOT: Objection to form.

Asked and answered.

A. If a judge says what's his basis for expertise, I would list everything that I've done. But if you say what's the basis for an opinion, I'm not relying on those consulting projects as a basis for an opinion in this case.

Q. So even though you're relying on

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C. WEIR

those consulting projects as a basis for your expertise, your claimed expertise, you are unwilling to discuss the specifics of them or disclaim them, correct?

A. I thought that's --

MS. WESTCOT: Objection to form.

Asked and answered.

A. You broke your promise about the last question on that topic. Again, I can't walk away from the fact that I've had these experiences, but I am not relying on any of those consulting projects, per se, for any opinion that I've issued here in Tom's of Maine. I'm not willing to disclose the details of those consulting projects pursuant to the NDAs that prohibit that, as we've talked about several times now.

Q. Okay. That's your choice. We may have to be back.

MR. WEISBERG: But let's take a break. Madam court reporter, how long of a break would you like? I know it's noon on the East Coast -- sorry. Let's go off the record.

1 C. WEIR

2 trustworthiness as a witness. I'm not
3 casting aspersions, but it is relevant.
4 There's a large -- large scope of what is
5 relevant here, and I think we're entitled
6 to it. You obviously disagree, and I
7 don't intend to argue the point here. We
8 can discuss it before the judge.

9 MS. WESTCOT: Well, if you have any
10 questions specifically about his
11 compensation in this engagement, I'm sure
12 Mr. Weir would be happy to answer those
13 today. So if you have questions about
14 that, please ask him today so we don't
15 have to come back another day for the
16 relevant portion of your questioning.

17 MR. WEISBERG: Okay.

18 BY MR. WEISBERG:

19 Q. Mr. Weir, your report states you
20 also have an MBA in the High Technology
21 program from Northeastern University, correct?

22 A. Yes.

23 Q. When did you begin your studies in
24 that MBA program? When did the program
25 commence?

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C. WEIR

A. We talked about that earlier today, as well. That was in the summer of 2007.

Q. And do you stop working at ETI while enrolled in the MBA program, or did you do them simultaneously?

A. It was a requirement of the MBA program that the students in the cohort be employed full time while earning their degree. So I maintained my employment at ETI full time during that span of, I guess, two-ish years that I was doing the MBA.

Q. So you probably mentioned this, this morning, and I apologize if I forgot the date, but you completed your MBA in 2009?

A. Correct.

Q. All right. What is the High Technology program, specifically?

A. It's defunct now; I don't think it exists anymore. But it was an MBA program that was designed -- there were sort of two salient things. One is that it requires that you have employment. In other words, they wanted people who were already in business. And then the case studies that we were using

1 C. WEIR

2 tended to be maybe more modern, like studying
3 Apple Computer instead of General Motors in
4 the mid century.

5 Q. So from digging at -- digging around
6 online, I was able to find a description of
7 the program, and it's described as follows:
8 "Designed for both techies and managers alike,
9 an online MBA and High Technology Management
10 is offered by Northeastern University.
11 Whether you are an IT architecture specialist
12 who wants to acquire leadership skills, or you
13 are a manager who wants to strengthen your
14 technical knowledge, this graduate degree will
15 put your career in prime position for
16 advancement."

17 Do you agree with that description
18 of the program?

19 A. That is not --

20 MS. WESTCOT: Objection to form.

21 A. That is not an accurate description
22 of the program that I took. I can tell in
23 part because it says it's an online program,
24 and 100 percent of my classes were in person,
25 and it was not focused on IT managers at all.

1 C. WEIR

2 Q. As part of your MBA program, did you
3 take any classes in retail pricing?

4 A. I would give you the same answer as
5 to my under graduate degree. I don't think
6 there was any one class titled retail pricing,
7 but there were many classes that touched on
8 pricing and strategies and that sort of thing.

9 Q. Do you recall the names of any of
10 those classes?

11 A. I think the classes had boring
12 names, like Economics 1 and Economics 2, but I
13 wouldn't swear my life on it.

14 Q. So you don't recall any specific
15 names of classes that you recall touched on
16 retail pricing topics?

17 A. For example, I remember that there
18 were classes where the key subject was
19 economics, that touched on pricing. But as to
20 the precise name of the class, again, I
21 thought they had boring names like Economics 1
22 or Economics 2, but I could be wrong about
23 that.

24 Q. So as part of your MBA, you took
25 classes, kind of general economics classes

1 C. WEIR

2 that touched on retail pricing as one of many
3 topics within the class. Is that accurate?

4 A. I think there are many classes, both
5 focused on economics and other categories,
6 that included studies of pricing and retail
7 pricing. Economics is one that I remember
8 specifically. They did also teach other
9 topics.

10 Q. But you don't recall any of those
11 classes being specifically focused on retail
12 economics or retail pricing, correct?

13 A. Yeah, I think that could be
14 misleading to somebody reading the transcript.
15 The classes taught those topics, but that
16 wasn't the singular focus of the class.

17 Q. In any of the classes you took as
18 part of your MBA, was retail pricing or retail
19 economics a main focus of the class?

20 MS. WESTCOT: Objection to form.

21 A. I certainly walked away feeling like
22 I had more experience and expertise in retail
23 pricing after taking those classes, so to me,
24 I would say yes.

25 Q. But just objectively, from the

1 C. WEIR

2 perspective of a course syllabus, for
3 instance, in any of the classes you took as
4 part of your MBA, was retail pricing or retail
5 economics a main focus of the class?

6 MS. WESTCOT: Objection. Asked and
7 answered.

8 A. To the best of my ability to answer
9 that question, I would say yes.

10 Q. Which classes?

11 A. I already told you that I can't
12 remember the titles of the classes, but some
13 of them included economics courses that I
14 think had boring names like Economics 1 or
15 Economics 2.

16 Q. But you can remember the nature of
17 the syllabus for those courses and the fact
18 that a majority of it was dedicated to retail
19 pricing and retail economics, and you can't
20 remember the name of the course?

21 MS. WESTCOT: Objection.

22 Argumentative. Misstates the witness'
23 prior testimony.

24 A. I can recall that there were many
25 classes that touched on retail pricing,

1 C. WEIR

2 including in such a manner that I would
3 describe it as having been a, quote, main
4 focus of the class. I don't know that I have
5 an ability to break down a syllabus into
6 majority and minority. I don't even know how
7 you would define or measure that. But I do
8 specifically remember doing things like retail
9 pricing, pricing strategy, analysis of
10 profitability that results, and
11 decision-making that relates under various
12 different scenarios about whether you
13 increase, decrease, or hold prices steady.

14 Q. For those classes that you were just
15 describing, do you have any understanding as
16 to the approximate number of days, course days
17 spent discussing those topics?

18 A. I don't have a precise memory of
19 that. Many days, but I couldn't quantify.

20 Q. So it's your testimony that as you
21 sit here today, although you can't remember
22 the names of those specific classes, you do
23 recall taking classes that touched on retail
24 economics and retail pricing in your MBA, and
25 you also can't remember approximately how many

1 C. WEIR

2 days were spent discussing those topics in the
3 courses?

4 MS. WESTCOT: Objection to form.

5 A. Retail pricing was one element of
6 the MBA. Anybody who's going into business is
7 eventually going to have to sell a product.
8 Many of them are going to get sold at retail.
9 There were many classes that worked on that
10 subject. You are correct that I don't
11 remember the precise name, and nor do I have
12 memorized the number of days when that subject
13 was on the docket in any particular class that
14 did touch on that topic.

15 Q. Just to be clear, I'm not asking do
16 you know the precise number of days that those
17 topics were discussed. Do you have any
18 understanding of the approximate proportion of
19 days of the class when those topics were
20 discussed?

21 A. I couldn't tell you the proportion
22 because I can't remember the number of days.

23 Q. Did you take any classes as part of
24 your MBA focused on conjoint analysis?

25 A. Yes.

1 C. WEIR

2 Q. Okay. Which class?

3 A. There was one class that was
4 dedicated solely to conjoint, and another
5 class that involved the practical use of
6 conjoint in various applications, as well as
7 some other marketing issues.

8 Q. What was the name of the class that
9 was dedicated solely to conjoint?

10 A. I don't recall, specifically.

11 Q. What was the name of the professor
12 who taught that class?

13 A. Rosanna Garcia.

14 Q. And what was the name of the class
15 that involved the practical use of conjoint?

16 A. That I don't recall.

17 Q. What was the name of the professor
18 who taught that class?

19 A. I could be wrong, but my best
20 recollection is that it was co-taught by
21 Dr. Garcia and Marc Meyer.

22 Q. Do you recall what grade you got in
23 the conjoint class that Professor Garcia
24 taught?

25 A. I believe I had the highest GPA of

1 C. WEIR

2 my class. Or if not, I was in the highest
3 echelon. So it couldn't have been a low
4 grade, but I do not have that transcript
5 memorized.

6 Q. You're talking about the highest
7 overall GPA in your class?

8 A. Or very close to it.

9 Q. How long was the class that you were
10 referring to that was focused on conjoint?
11 Was it a semester?

12 A. Each class was a semester, yes.

13 Q. Have you received any post-MBA
14 training or education on which you're relying
15 for your opinions in this case?

16 A. Yes.

17 Q. Okay. What?

18 A. Well, in one category, which I
19 believe I mentioned in the report, I take
20 postgraduate training in conjoint analysis. I
21 don't know that there's any one class I would
22 point to, but again, generally as to my
23 expertise, I believe that bolsters my
24 credentials as a conjoint practitioner. And I
25 have 19 years of on-the-job experience

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C. WEIR

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that's due at the end of the training.

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Q. I see. But there's no half-sale

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type of determination at end of the training?

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If you're there and you complete it, you've

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completed it?

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A. That's right.

8

Q. Now, Exhibit 1 to your report, which

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was marked as Exhibit 2, that was your

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publications, correct?

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A. Exhibit 1 to the report is my

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Statement of Qualifications. Part of that

13

Statement of Qualifications includes a list of

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publications.

15

Q. And Exhibit 1 says, "Mr. Weir has

16

co-authored the following," and then lists a

17

number of publications. Do you see that?

18

A. Again, that's a subsection of the

19

document, but I do see to where you are

20

referring.

21

Q. Okay. And on which, if any, of

22

these publications are you the lead author?

23

A. All of these are publications that

24

were done within the purview of the firm, and

25

I don't think we've ever used a designation

1 C. WEIR

2 such as the "lead author" like you might in an
3 academic setting.

4 Q. But have you ever authored any
5 publications outside of your work for ETI?

6 A. No. Well, it depends on how you
7 define that. You could talk about my senior
8 capstone project at college, for example. But
9 if you're talking about, you know,
10 post-undergrad and publications, what you see
11 is what you get on the list.

12 Q. But your capstone report was never
13 published, was it?

14 A. People have different feelings about
15 what that term means, so I would rather be
16 overinclusive than underinclusive and accused
17 of withholding something.

18 Q. That's fine.

19 Now, each publication in the
20 description, it has phrasing, "prepared on
21 behalf of," and then it lists an entity. What
22 does that phrasing mean?

23 A. It indicates that we were hired by
24 the client to conduct some independent
25 research and to publish our findings.

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Q. So none of the publications listed here in Exhibit 1 have been peer reviewed?

A. I don't believe so. At least not within my understanding of what that means in academia.

Q. And to your knowledge, has any work by you, whether listed in this Exhibit 1 or otherwise, ever been subject to peer review?

A. "Any work"? I mean, I feel like --

Q. A publication, written product, analysis.

A. Yeah, I feel like these contested proceedings, somebody's always reviewing your work. But outside of that sort of adversarial, somebody else is critiquing your work, I'm not an academic, I'm a consultant, so I'm not regularly submitting things for peer review (indicating).

Q. So outside of a litigation context, none of your work has been subject to peer review?

MS. WESTCOT: Objection to form.

A. Not that I'm aware of. Again, I'm not in an industry where we submit work for

1 C. WEIR

2 peer review.

3 Q. Now, a couple of times today you've
4 referred to that you base your expertise in
5 this case on 19 years of experience, right?

6 A. Yes.

7 Q. Okay. And I just want to make sure
8 I'm clear about what comprises that experience
9 on which you rely in claiming your expertise.
10 So does your claimed expertise rely
11 on your work with Stop & Shop?

12 A. That's not part of the 19 years that
13 I'm mentioning, but I do believe that there
14 are small elements of my time at Stop & Shop
15 that could be informative in this case. I've
16 already put on the record I think maybe the
17 most important conclusion, which is that if
18 there's a product in existence, a grocery
19 store's going to want to sell it for some
20 money, rather than no money.

21 Q. And then another basis of your
22 claimed expertise in this case is the
23 consulting work that you previously declined
24 to get into specifics about based on your NDA,
25 correct?

1 C. WEIR

2 MS. WESTCOT: Objection to form.

3 A. That's part of the 19-year career
4 that I've had at ETI.

5 Q. And that's part of the basis for
6 your claimed expertise in this case, correct?

7 A. I don't think I would need that
8 consulting experience to have the credentials
9 to give the opinions I have, but it's
10 experience that I have had.

11 Q. What other experience are you
12 relying on in claiming your expertise in this
13 case?

14 A. Well, there's my undergraduate
15 degree, my graduate degree, my postgraduate
16 education, my time at ETI, and I guess the
17 time at Stop & Shop.

18 Q. So undergraduate degree, that's the
19 time at college in Ohio, right?

20 A. Yes.

21 Q. Graduate degree is the MBA from
22 Northeastern?

23 A. Yes.

24 Q. And the postgraduate education
25 you're referring to the Sawtooth training we

1 C. WEIR

2 were discussing?

3 A. Yes.

4 Q. Okay. And your time at ETI, that
5 reflects the consulting work that is subject
6 to the NDA. Does it include anything else?

7 A. Yes.

8 MS. WESTCOT: Objection to form.

9 Misstates the witness' prior testimony.

10 A. I've done consulting work for
11 private clients, but we also do consulting
12 work for government agencies, various
13 different groups, and many, many cases that
14 are similar to this one. So the next part of
15 the Statement of Qualifications has a list of
16 cases I've worked on in the last four years.
17 I've now been involved in, it's got to be,
18 hundreds of cases at this point that would
19 provide guidance and expertise upon which I
20 draw in submitting opinions in this case.

21 Q. Which government entities have you
22 consulted with that you are relying on as part
23 of your experience for your expertise in this
24 case?

25 A. I'm having a real hard time with the

1 C. WEIR

2 Q. So other than CPUC and the
3 Department of Justice, are there any other
4 government entities for which you've done
5 consulting projects involving retail economics
6 or retail pricing?

7 A. Pennsylvania Department of Revenue
8 is one of the ones for which I had suggested
9 that there was at least one project. I'm
10 fairly certain the Illinois Office of the
11 Attorney General would be the same.

12 Q. And what about, you said other
13 groups you also do consulting work for
14 involving retail pricing and retail economics.
15 What groups were you referring to?

16 A. These are older projects that go
17 back some time, but there are groups that
18 monitor retail pricing and participate in
19 proceedings before regulators. I'm trying to
20 think -- they're all acronyms. I'm trying to
21 remember what they stand for. But, you know,
22 groups of telephone regulators, for example,
23 would hire us, and we would do work for them.

24 Q. Can you think of an example?

25 A. Yeah. One of them is called NASUCA.

1 C. WEIR

2 I don't remember what the acronym stands for,
3 but it's an acronym.

4 Q. Do you remember how to spell that
5 acronym?

6 A. I think it's as you would do it
7 phonetically; N-A-S-U-C-A.

8 Q. I would have spelled it differently,
9 so I'm glad you said that.

10 A. Okay.

11 Q. So in terms of litigation, you said
12 you've worked in hundreds of litigation
13 matters involving retail pricing and retail
14 economics; is that right?

15 A. I think I was speaking more broadly,
16 that we were talking about my experience, that
17 that involved hundreds of contested
18 proceedings that don't always necessarily
19 involve litigation. But of those hundreds,
20 there are dozens, if not more than a hundred
21 cases, that involve analysis in one way or
22 another of what consumers pay in the
23 marketplace and the impact that some at-issue
24 behavior has on what consumers pay in the
25 marketplace.

1 C. WEIR

2 Q. Have you ever taught a class in
3 retail pricing or retail economics?

4 A. I don't believe so, no.

5 Q. Have you ever taught a class in
6 conjoint analysis?

7 A. I teach people here at the company
8 how to use the technique, but I'm not a
9 professor, so I'm not regularly in a position
10 to teach classes.

11 Q. Outside of teaching other people at
12 ETI about conjoint analysis, have you ever
13 taught a class about conjoint analysis?

14 MS. WESTCOT: Objection. Asked and
15 answered.

16 A. No.

17 Q. Have you ever personally overseen a
18 conjoint analysis?

19 A. Many times, yes.

20 Q. Approximately how many times?

21 A. Dozens; more.

22 Q. Under what circumstances?

23 A. I do them in cases such as these,
24 when my client hires me to do the full
25 conjoint work. We also do them for our

1 C. WEIR

2 private clients.

3 Q. Just to be clear, have you ever
4 personally designed and ran a conjoint
5 analysis --

6 A. Yes.

7 Q. -- a conjoint survey?

8 A. Yes.

9 (Discussion held off the written
10 record.)

11 Q. Have you ever personally designed
12 and conducted a conjoint survey that has been
13 accepted and relied on in court?

14 A. I believe so.

15 Q. Do you know which court?

16 A. I would need to go look that up, but
17 various federal courts.

18 Q. Do you recall when?

19 A. Over the last half a dozen years,
20 probably.

21 Q. Can you name a single court that has
22 accepted a conjoint survey that you personally
23 designed and conducted?

24 A. There was one that I designed that
25 was accepted by the -- one of the New York

1 C. WEIR

2 districts. We didn't get to the point where
3 it was run. I don't remember the court, but I
4 did a case about New Balance sneakers. I
5 believe that result was accepted. That was
6 years ago. Maybe there was a case in
7 Connecticut where I had another design that
8 was submitted. That case was scuttled for
9 other reasons other than the conjoint.

10 Q. Okay. So I just want to be clear.
11 So have you ever designed and conducted, so,
12 you know, run the survey, taken it to
13 fruition, gotten results and analyzed them,
14 that was accepted by a court?

15 A. I just told you the New Balance case
16 was one. There are a couple of others.
17 There's one pending right now. That one I
18 know is out in California.

19 Q. What court was the New Balance
20 survey before?

21 A. I don't remember, off the top of my
22 head.

23 Q. Do you remember whether it was the
24 state or federal court?

25 A. I believe it's federal court.

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Q. Do you recall what state the federal court was located in?

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A. I don't.

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Q. Do you recall what year your conjoint was accepted by the Court?

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A. My recollection is -- well, it was definitely before the pandemic and maybe a couple years, so 2017, 2018 maybe. But again, I don't have the dates memorized.

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Q. Other than New Balance -- was New Balance a party to that case?

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A. They were the defendant in the case, yes.

14

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Q. Do you recall the name of the plaintiff in that case?

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A. I think the plaintiff's last name was Dashnaw, but again, I'm not a hundred percent on that.

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Q. Do you recall the nature of the claims in that case?

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A. The case centered on New Balance's practice of labelling some of its sneakers as being made in the USA, and the allegations were that the sneakers definitely would not

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C. WEIR

meet the requirements to use that phrase, and we were testing the impact on the market price of the removal of the "Made in the USA" claim from the New Balance packaging.

Q. So you were testing a price premium in that case?

A. Yeah. I mean, the facts and circumstances are obviously different, but conceptually, it's very similar to what happened in this case. There's a statement that's made on the packaging, we want to find out whether or not there's a market impact due to the use of the claim at issue. In that case, it happened to be "Made in the USA."

Q. And you also mentioned an ongoing California case. What's the name of the plaintiff in that case?

A. That's a good question. I can tell you the defendant for sure, but I would have to think for a minute on the plaintiff's name.

Q. What's the defendant's name?

A. R.C. Bigelow.

Q. And what is the nature of the claims in that case?

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A. Actually, fairly similar to the New Balance project. They put on their tea -- Bigelow sells tea bags. They put on some of their boxes of tea bags a statement that says, and I may be -- I'm just going to paraphrase, but something like manufactured in the USA, 100 percent American family owned. And the legal claim is that, again, that would mislead a consumer into believing that the product was made in the USA. There's no way that the teas would qualify for the use of that type of statement, and the question is, what would happen if you remove the offending statement from the packaging.

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17

Q. And is that in federal or state court in California?

18

19

A. Pretty certain it's federal court.

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22

23

A. This one I can do by looking at the Statement of Qualifications. It's the second case down on page 3 of Exhibit 1 to Depo Exhibit 2.

24

25

Q. So I see Kimberly Banks, etcetera, versus R.C. Bigelow?

1 C. WEIR

2 A. Yes.

3 Q. And did your conjoint analysis in
4 that case -- again, this is a conjoint
5 analysis that you designed and oversaw to
6 completion?

7 A. Correct.

8 Q. And has your conjoint analysis in
9 that case, the Bigelow case, been accepted by
10 the Court?

11 A. It certainly hasn't been rejected,
12 that I'm aware of, but I don't know if
13 their -- what the posture of the case is at
14 the moment.

15 Q. And is the New Balance case you were
16 referring to listed on your Statement of
17 Qualifications?

18 A. If it was within the last four
19 years, then yes. If not, it may have fallen
20 off of the list.

21 Q. Okay. Other than the New Balance
22 case that we've discussed and the California
23 Bigelow case that we've discussed, are there
24 any other instances where a conjoint that you
25 have designed and overseen has been accepted

1

C. WEIR

2

by a court?

3

A. So you're creating the restriction

4

that it has also been done, designed and done?

5

Q. Yes.

6

A. Is that part of the question?

7

Q. Yes. Designed, run the survey, you

8

have data, and you analyze it.

9

A. It's possible that there's one or

10

two other cases. There are many cases where I

11

have designed a survey and that's all that I

12

have been asked to do, and the courts have

13

accepted the design of the survey.

14

Q. And are those cases listed on your

15

Statement of Qualification?

16

A. If they happened within the last

17

four years, then yes. One of them is the in

18

re Fisher-Price, it's a case out of

19

Connecticut involving -- gosh, I'm sorry --

20

Craftsman Tools, I think. I would have to jog

21

my memory. There are more than those, but

22

those are some examples that I can think of

23

for sure.

24

Q. From reading your Statement of

25

Qualifications, I take it you've also applied

1 C. WEIR

2 conjoint analyses that other people performed?

3 A. Yeah, there were 30-plus cases that
4 have involved me working in the capacity that
5 I am in this case, which is that I helped with
6 the design of the conjoint survey and have
7 brought to bear my mixed experience both with
8 conjoint and economics to help the team with
9 those issues. And then ultimately, after
10 reviewing the results and finding them to be
11 economically reasonable, apply the results to
12 calculate damages.

13 Q. Have you ever applied a conjoint
14 analysis, either designed by yourself or
15 someone else, outside of a litigation context,
16 such as a commercial or academic setting?

17 A. Yes. Like I mentioned earlier
18 today, we do conjoint analyses for our private
19 clients.

20 Q. And can you name those private
21 clients, or is that subject to the NDA, as
22 well?

23 A. I'm happy to give you some
24 high-level information about the nature of the
25 studies, but I cannot disclose the particular

1

C. WEIR

2

clients.

3

Q. Yeah, please provide the extent of

4

the information that you feel comfortable.

5

A. We recently have done some studies

6

involving food products and pricing related to

7

food products. We've done another one

8

recently that involved shampoos and actually

9

maybe deodorant, now that I'm thinking about

10

it, and how those products are priced within

11

the marketplace.

12

Q. What --

13

A. There are others. I'm just trying

14

to recall. Sometimes the litigation and the

15

consulting work kind of blends together in my

16

mind as to which is which.

17

Q. When did you conduct this food

18

product conjoint analysis?

19

A. That's actually work that's ongoing.

20

The shampoo and deodorant studies I think were

21

done earlier this year, maybe. Might have

22

begun at the tail end of last year.

23

Q. And was the food product conjoint

24

study done on behalf of a manufacturer or a

25

retailer?

1 C. WEIR

2 A. That, I'm not comfortable
3 disclosing.

4 Q. Same question with regard to the
5 shampoo study.

6 A. Same answer.

7 Q. And same question with regard to the
8 deodorant study.

9 A. The shampoo and deodorant were the
10 same group.

11 Q. Oh.

12 A. But I cannot reveal the party.

13 Q. Okay. Again, just for the record, I
14 disagree with your refusal to answer the
15 question. You have not been instructed by
16 counsel not to answer. And it is relevant to
17 your expertise in this case and your testimony
18 that you seek to give. So I reserve my right
19 to revisit that issue at a later date.

20 MS. WESTCOT: And, Mr. Weisberg,
21 just for the record, as you probably know,
22 most NDAs and confidentiality agreements
23 require the party to give advanced notice
24 before making a disclosure publicly. So
25 it's something that Mr. Weir would have to

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C. WEIR

consult with parties to the NDAs. It's not something that he can just disclose today.

MR. WEISBERG: I mean, I haven't seen the NDA, so I don't know.

MS. WESTCOT: I'm sure you've seen an NDA, maybe.

THE WITNESS: And I'm doing my best to be as helpful as I can about giving as much detail as I feel comfortable.

MR. WEISBERG: No, and I understand, Mr. Weir, yeah. I'm not trying to beat up on you here. It's just, yeah, I just disagree.

BY MR. WEISBERG:

Q. So do you feel at liberty to share the nature of the attribute you were measuring in the conjoint analyses for the food product or the shampoo and deodorant?

A. There were many attributes and levels within the conjoint. But as to the specifics, I don't think it would be appropriate for me to discuss those.

MR. WEISBERG: I want to reserve the

1 C. WEIR

2 same rights.

3 A. Actually, I'll -- there's detail
4 that I think I can give. We use brand,
5 there's price, and then there are information
6 that are specific to the specific foods that
7 are being studied.

8 Q. And the specific information about
9 the foods being studied you feel you cannot
10 disclose at this time?

11 A. Without going beyond saying that
12 it's information that's on the packaging of
13 existing products.

14 Q. Do the opinions in your report rely
15 on any education or training that we have not
16 discussed today?

17 A. So I put in the Statement of
18 Qualifications some other things that I do,
19 including serving on the board of trustees at
20 a school and serving as the comptroller of a
21 partnership that manages investments for the
22 education and benefit of the partners. I
23 don't think that there are, per se, specific
24 things where I would say, again, like, ah, I
25 learned this as the comptroller and I'm

1

C. WEIR

2

applying it to Tom's of Maine, but they do

3

comprise part of my experience.

4

Q. I actually had just asked about your

5

education or training rather than experience

6

at large. So just, are there any opinions in

7

your report that rely on education or training

8

that we have not discussed today?

9

A. We've talked about undergraduate,

10

graduate, postgraduate, and my time at ETI. I

11

think those are probably the things that I'm

12

relying on.

13

Q. Okay. And I think you already

14

answered this one inadvertently, but did the

15

opinions in your report rely on any personal

16

experience that we have not yet discussed

17

today?

18

A. Yeah, I think my prior answer gets

19

to that, which is that I have experience

20

involving data analytics and other accounting

21

things that arguably make me, I guess I would

22

say, more qualified to do the work that I've

23

done here. But I don't think specific

24

experiences on the board of trustees or as the

25

comptroller of the investment partnership lead

1 C. WEIR

2 to opinions that I've issued here in Tom's of
3 Maine.

4 Q. And you previously said that you are
5 relying on your experience conducting projects
6 for private clients at ETI as informing your
7 expertise in this report?

8 MS. WESTCOT: Objection. Misstates
9 the witness' prior testimony. Asked and
10 answered.

11 A. There's nothing in the report that
12 derives from a consulting project that I've
13 done. But, I mean, it literally is part of my
14 past, so I have that experience. I don't know
15 that I would be required to have that
16 experience to, for example, qualify as an
17 expert, but I do have those credentials.

18 Q. Do you consider yourself to be an
19 expert in statistical analysis?

20 A. Statistics is a broad field. I
21 wouldn't want to take credit for being an
22 expert in the entirety of the field, but there
23 are areas of statistics where, yes, I would
24 hold myself out as an expert.

25 Q. And which areas of statistics would

1 C. WEIR

2 difference between the calculation of MWTP in
3 this article and the calculation of a market
4 price?

5 A. The willingness to pay of the
6 marginal consumer is definitionally the same
7 as the market price. So if the authors have
8 faithfully reported a calculation of the
9 willingness to pay of the marginal consumer,
10 then yes, it is calculating a change in market
11 price under specific conditions.

12 Q. And do you know whether the authors
13 to this study used marginal willingness to pay
14 in the same way that you do?

15 A. That is my read of the article, as a
16 professional in the field.

17 MR. WEISBERG: Let's, Julian, let's
18 go back to -- let's mark, excuse me, tab 8
19 as Exhibit 5.

20 MR. BUFF: Yes, will do.

21 (Weir Exhibit 5, Testing Consumer
22 Perception of Nutrient Content Claims
23 Using Conjoint Analysis, marked for
24 identification, as of this date.)

25 Q. Mr. Weir, let me know when you have

1

C. WEIR

2

the article in front of you.

3

A. Okay. I have Exhibit 5 up.

4

Q. Do you recognize this as the

5

healthfulness survey that you refer to in

6

paragraph 26 of your report?

7

A. Testing Consumer Perception of

8

Nutrient Content Claims.

9

Q. So this is the article --

10

A. I cite that in footnote 17 of

11

paragraph 26.

12

Q. Okay. Now, your report doesn't

13

claim that this survey calculates a price

14

premium or a market price, correct?

15

A. I don't believe that it does. This

16

is just an exemplar of conjoint being

17

scientific and peer reviewed, well-accepted.

18

Q. But it's not an example of conjoint

19

being used to measure a market price or price

20

premium, correct?

21

A. Not to the best of my recollection.

22

MR. WEISBERG: Julian, let's go

23

ahead and mark tab 9 as Exhibit 6.

24

(Weir Exhibit 6, Evaluation of

25

Packing Attributes of Orange Juice on

1 C. WEIR

2 Consumers' Intention to Purchase by
3 Conjoint Analysis and Consumer Attitudes
4 Expectation, marked for identification, as
5 of this date.)

6 MR. BUFF: The exhibit has been
7 introduced.

8 Q. Let me know when you have it in
9 front of you, Mr. Weir.

10 A. Okay. I have it.

11 Q. Okay. Do you recognize this as the
12 orange juice survey referred to in paragraph
13 27 of your report?

14 A. Sorry, I've got enough things open
15 now that it takes me a minute to get back and
16 forth.

17 Q. Just to be clear, the only things
18 open on your computer are the Veritext Zoom
19 and the Exhibit Share and the exhibits to this
20 deposition, correct?

21 A. Yes, but I had the complaint, I had
22 two other articles. I only have two displays.
23 So normally I can toggle back and forth pretty
24 easily, and so when I toggled, I got the Zoom
25 screen back, and not the report.

1 C. WEIR

2 Q. That's fine. I just wanted to make
3 sure that you didn't have anything else open.
4 You have Exhibit 6 in front of you?

5 A. I was back at the report to confirm.
6 I've lost -- to be honest, I've lost track of
7 the pending question. Why don't you start
8 again, and I'm happy to go to the article, if
9 that's what you want.

10 Q. That's fine. So in paragraph 27 of
11 your report, you discuss an orange juice
12 survey. Do you see that?

13 A. Yes.

14 Q. Okay. And do you recognize
15 Exhibit 6 as the orange juice survey referred
16 to in or cited to in paragraph 27 of your
17 report?

18 A. It's been a while since I've looked
19 at this paper, but the title and the authors
20 match.

21 Q. So you have no reason to doubt that
22 it's the same article you cite in paragraph 27?

23 A. Not that I'm aware of at this very
24 moment, no.

25 Q. Your report in paragraph 27 says

1 C. WEIR

2 that this study, quote, "showed that vitamin C
3 content was the most important purchase driver
4 besides price," right?

5 A. Sorry, I'm toggling back.

6 Yes, I do say that it was the most
7 important purchase driver.

8 Q. But isn't it true that in this
9 study, Vitamin C was just the second most
10 important purchase driver out of the four
11 drivers studied in the survey; not the second
12 most important driver overall?

13 A. I'll be honest, I put this article
14 into the current report because I had
15 basically used my old report as a -- as a
16 template for that. I haven't read this in
17 some time. If you have particular things you
18 want to point me to that can speed things
19 along; otherwise, I'm going to have to read
20 the paper to get to an answer to that question.

21 Q. I mean, do you have any
22 understanding as to whether this article
23 measures four purchase drivers or all purchase
24 drivers?

25 A. Oh, I mean, a conjoint is almost

1 C. WEIR

2 never going to have every element of a product
3 put into it. That would be -- you would need
4 to be dealing with a very simple product.
5 Conjoint, the best practices say,
6 purposefully, please do not put everything
7 into the survey; you know, limit yourself to,
8 say -- I mean, there's no exactly hard and
9 fast rule -- eight attributes. I know more
10 complicated products can use 20 attributes.
11 But yes, it would be -- it would be unusual to
12 see every attribute of a product measured in a
13 conjoint survey, especially for a more complex
14 product.

15 Q. So, just to clarify, do you have any
16 reason to claim that this survey speaks to all
17 purchase driver -- or this article states that
18 Vitamin C content is the second most important
19 purchase driver for all drivers of the orange
20 juice product?

21 A. I don't think that's what I say in
22 my report.

23 Q. Your report says that, (as read)
24 "the studies show that vitamin C content was
25 the most important purchase driver besides

1

C. WEIR

2

price."

3

A. And of the things studied in the

4

survey, I believe that statement is true.

5

Q. Your report also says that this

6

study showed that "the minimum price premium

7

for vitamin C was approximately 17 percent,"

8

right?

9

A. Yes.

10

Q. And please show me where in the

11

study you're relying on to support that

12

statement.

13

A. Again, I don't know that I'm going

14

to be able to do that without rereading the

15

whole paper here. It's been a while since

16

I've looked at this.

17

Q. I'll direct you to page 64 of table

18

7, which lists -- the only place I could find

19

17 percent mentioned in this study is under

20

Cluster 3, under Relative Importance. There

21

there's a 17 percent listed and then there's

22

an 18 percent and a 34 percent. But that's

23

under Relative Importance.

24

A. I see where it says that. I'm not

25

sure where the 17 percent premium comes from.

1 C. WEIR

2 Q. Is it your testimony that this
3 article does show or calculate a 17 percent
4 price premium for Vitamin C?

5 A. I can go back and read the paper and
6 see if I can confirm that, or I can say that
7 that was my memory from years ago when I cited
8 this.

9 Q. But you would accept that that might
10 not be a correct understanding of the survey?

11 A. Without reading it, again, I would
12 say it could be right, it could not be right.
13 Either way, the point still stands that people
14 are using conjoint within a peer reviewed
15 context, which is part of the point of citing
16 the paper, and I am 100 percent behind that
17 opinion. I don't rely on the 17 percent price
18 premium for determining the damages in the
19 case or something like that.

20 Q. Well, but are you holding up -- I
21 guess my fundamental question here is: Are
22 you holding up this article as support for the
23 general principle that conjoint, as an
24 analytical methodology, is used in the peer
25 reviewed literature, or are you holding it up

1 C. WEIR

2 as support for the narrower principle that
3 conjoint, as an analytical methodology for
4 studying but-for market prices is supported in
5 the peer reviewed academic literature?

6 A. The former.

7 Q. Okay. And with the second article
8 that we were just looking at, Exhibit 5, which
9 is the healthfulness study, the Drewnowski
10 article, which point are you holding that up
11 for, the general principle about conjoint
12 being academically peer reviewed as a general
13 analytical method, or the narrower point?

14 A. I'm using that article for the
15 principle that conjoint is peer reviewed,
16 widely accepted, scientific. Just that
17 general principle.

18 Q. Okay. The same with the first
19 article, as well?

20 A. The first article is more broad. It
21 is also the general point that conjoint is
22 peer reviewed, published, academic, reliable,
23 accepted in the community, and calculates a
24 price premium for a labelling attribute under
25 specific sets of circumstances.

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C. WEIR

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Q. Now, paragraph 28 of your report, Exhibit 2, says that, quote, "The use of conjoint analysis in similar applications is too extensive to document exhaustively here." As you sit here today, are you aware of any additional academic or industry study that you rely on in your report that uses conjoint specifically as a means of measuring but-for market pricing?

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A. Well, again, I have 30-odd court cases where federal judges have approved of conjoint to estimate a market price in the damages context. I have an article, there are textbooks that are cited. Beyond that, my point in this paragraph is, I didn't go cite every possible support for the premise that conjoint can be used in the manner in which I suggest that it can.

20

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Q. So excluding litigation, because my question was specifically an additional academic or industry study, so excluding the litigation, other than the Hirogaki article, are you aware of any additional studies, academic or industry studies, that you relied

1 C. WEIR

2 on in your report that used conjoint to
3 measure a but-for market price?

4 A. Well, the exclusion, the way that
5 you're doing it is a fiction in terms of my
6 process. I'm aware that conjoint has been
7 used this way and accepted by many courts. I
8 have an academic article, I have a textbook
9 that talks about it, and I don't go further
10 because I have all of that stuff together.

11 Q. And the textbook you're referring to
12 is the Orme textbook; O-R-M-E?

13 A. Yes.

14 Q. And what specific part of that
15 textbook are you referring to?

16 A. There's a section that, if my memory
17 serves, talks about the market simulation that
18 is the one used by Dr. Dennis.

19 Q. And in your recollection, does the
20 Orme textbook specifically endorse the use of
21 conjoint to determine but-for market prices?

22 A. Yes. Well, he doesn't use but-for,
23 which is a legal term, but there's a premise.
24 If you're going to hold everything else
25 constant and you want to determine the value

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C. WEIR

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of a particular attribute, here's how to do it, and the set of circumstances matches the but-for. It's everything else held constant, you're only changing the one attribute or level.

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Q. So you have the academic article, you have the Orme textbook. Are you relying on any other academic or industry study in support of this claim that conjoint can be used to measure but-for market prices?

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A. I mean, this seems so self-evident to me, and again, the point of the paragraph that you raised is that I purposely didn't go try to get every potential source. So no, those are the things that I have relied upon, plus my experience.

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Q. Now, we talked a lot about conjoint generally. But specifically with regard to this case, just to be clear, you did not personally conduct and complete the conjoint analyses that your report relies on, right? Dennis did those, Dr. Dennis did those?

24

25

A. Dr. Dennis and I worked in tandem on the conjoint design. I believe -- I mean,

1 C. WEIR

2 "executing the conjoint" is kind of a curious
3 term and I'm guilty of using it, but it's
4 pushing a button and then panelists do all the
5 work at that point, and then I would have to
6 go back and think about whether I also
7 reconstructed Dennis' results as to
8 toothpaste, but I believe I did do that with
9 the modern deodorant study that he has put
10 into the current report.

11 Q. So you said just now and you say
12 also in paragraph 33 of your report that you
13 worked with Dr. Dennis to develop parts of the
14 conjoint surveys in this case. Specifically,
15 which parts of the survey did you work with
16 Dr. Dennis to develop?

17 A. I'm also going to admit to being
18 guilty about using "survey" when maybe
19 "analysis" would also be an appropriate term
20 to put in there. In terms of the survey
21 instrument itself, I assisted Dr. Dennis by
22 providing information about real world
23 market-based prices that serve as the basis
24 for the range of prices used in the survey.
25 That's one of the ways in which supply is

1 C. WEIR

2 incorporated into the analysis. Dr. Dennis
3 and I discussed the use of hierarchical bayes
4 regression analysis to process the conjoint
5 data, which is a way of getting more market
6 realistic results from conjoint information.

7 We discussed the particulars of the
8 market simulation that he was going to use,
9 including holding supply fixed as a matter of
10 history, and holding everything else fixed in
11 the but-for world as it existed in the real
12 world, with the exception of the challenged
13 claim. We discussed structuring the
14 attributes and levels such that he could model
15 the challenged claim, both being present and
16 absent, holding everything else constant.

17 I think those are probably good
18 high-level descriptions. There might be more
19 nuance if we were to talk about it at greater
20 length.

21 Q. How many times did you discuss the
22 design of the conjoint survey with Dr. Dennis?

23 A. That's a good question. We had
24 spoken about the design however many years ago
25 that it was that he conducted the first

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C. WEIR

conjoint study about toothpaste, and then again this year as we talked about taking that similar design, but applying it to the facts and circumstances of deodorant. My guess is there would be many conversations if you include both of those time periods; maybe ten or more.

Q. Okay. How many conversations did you have for the older study?

A. That's where I'm just a little hazy on the memory because it's so many years ago now, but it had to have been several, including the original design, going back and forth on pricing, reviewing the theory of liability, and making sure there was an attribute and level that could test that. I don't have a precise recollection, but just back of the envelope, has to be several, half a dozen calls to cover those topics the first time we did this.

Q. And approximately how many times did you discuss the newer conjoint survey with Dr. Dennis?

A. Also several times. We reviewed

1 C. WEIR

2 pricing for deodorant. There was updated
3 sales data. We talked about attributes and
4 levels. Yeah, another handful of
5 conversations.

6 Q. So you've reviewed -- you said you
7 spoke with Dennis about sales data. Are you
8 talking about units sold or the prices they
9 were sold for --

10 A. Both.

11 Q. -- or both?

12 A. Both.

13 Q. And what sales data specifically did
14 you review before having that conversation
15 with Dr. Dennis?

16 A. So I had looked at IRI sales data.
17 I'm trying to remember if there was anything
18 more that I looked at. And I know that
19 Dr. Dennis went further with his pricing
20 review, at least to the best of my memory. So
21 IRI, it's possible that there was other
22 pricing information in the Bates numbered
23 documents that I don't remember, but I think
24 that's the primary source of pricing that I
25 had at my availability.

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C. WEIR

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Q. Now, in this case, it is your opinion that there is no need to determine a but-for quantity of sales, correct?

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A. You need a but-for quantity of sales. It's just going to be the same as the sales in the real world, because just logically, the price premium here concedes that people do receive some amount of value from the Tom's product, and if you logically say, in the but-for world, a person got value from Tom's deodorant, then they had to have had the Tom's product to derive that value, that means they had to buy the product at retail, assuming they obtained the product lawfully. And if they bought it lawfully, then it turns out they must have had that product at the store that they bought it from. They had the product at the store, that means that Tom's made the product.

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24

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And so if we go down that logical chain, you realize that in order to measure the value that the class members received or didn't receive, you'd have to deal with all of the transactions, no more, no less. And if

1 C. WEIR

2 you run a model that says let's estimate
3 value, but only across half of the
4 transactions, and we're going to assume that
5 half of them didn't take place, I suppose you
6 could do that, but you would then need to
7 account for the value of the unsold products,
8 because those would have a zero value, and
9 that would -- that would cause the damages to
10 be higher in that set of circumstances, if you
11 appropriately considered the products that
12 would not have been sold.

13 Q. And is that why in your report, you
14 refer to Dr. Dennis' price premium analysis as
15 an inherently conservative measure? It's in
16 paragraph 40.

17 A. Yes, that's exactly right. If you
18 were to engage in the arguendo debate over
19 let's figure out a different quantity, you
20 would need to go another step and say, okay,
21 when you don't sell units of the product,
22 people don't get any value, and you have to
23 control for that in the calculus, too. And in
24 all instances when you have unsold product,
25 the price premium is going to produce a

1 C. WEIR

2 measure of damages that is less than the full
3 refund that you would owe people if you were
4 to model a but-for world where you allowed
5 them to undo their transaction with Tom's and
6 get a full refund.

7 To be clear, I'm not proposing that
8 people get a full refund, but that's the
9 benchmark by which I'm saying the price
10 premium is conservative, as opposed to if you
11 were to adopt a method that said, let's change
12 the quantity supplies to be less, you'd wind
13 up owing some people a full refund if they
14 can't make their purchase.

15 Q. I see. So it is possible -- so,
16 like, you could have done that analysis and
17 determined how many sales just would not have
18 occurred, but you intentionally chose not to
19 do so and used the assumptions that you did
20 because you felt that doing so was a
21 conservative measure of damages?

22 A. You kind of strung a couple things
23 together there, and I --

24 Q. I'll break it up. It was a
25 complicated question. I'll break it up.

1 C. WEIR

2 A. Yeah.

3 Q. So I'll just say -- so, just to
4 confirm, you could have done the analysis you
5 were just describing, where you see, you know,
6 if the price, you know, would have stayed the
7 same, how many sales just wouldn't have
8 happened. That's also a way that you could
9 have looked at the impact of this claim,
10 correct?

11 A. As a technical matter, we could have
12 done a number of different things in the
13 model, one of which would be to say, imagine
14 the defendant is able to say the price is
15 going to be this, and no matter what, you're
16 stuck with that. And first of all, there are
17 lots of reasons not to do that. But as a
18 technical matter, you could do it.

19 One of the reasons you don't do it
20 is that we're trying to figure out the value
21 that people obtain from actually making a
22 purchase of the product, and so you've got to
23 model them making the purchase. Another
24 reason that you don't want to do it is that a
25 product can be worth less than, for example, a

1 C. WEIR

2 manufacturer might be willing to sell the
3 product for if they were given a choice. But
4 since these products have already been sold,
5 the willingness to sell can't impact the
6 damages calculus by artificially limiting the
7 price of the product.

8 You know, you could have a guy that
9 lies about the efficacy of the product. Were
10 talking about the sleeping pill. Imagine it
11 doesn't do anything at all, and the guy has to
12 put money into selling the products and
13 manufacturing them, so he might say, yeah, the
14 price has got to be at least this, but the
15 product is -- you don't need an economic
16 analysis to know that if the only thing the
17 product is advertised to do is help you sleep
18 and it doesn't do that, then it's worth zero.
19 And you can use that as a logical way to know
20 that you really should not be limiting the
21 price in the manner you described in order to
22 artificially depress sales.

23 Q. So in your analysis, aren't you
24 assuming that Tom's would have sold the same
25 number of units just for a uniformly lower

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price; 12 percent less for toothpaste, and

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21 percent less for deodorant?

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A. I don't think I get to making that assumption. I don't know. I've heard people disagree with crazier things, but I don't think we can dispute that class members bought these products. They were sold, and we're trying to figure how much value did those people receive, and how much value did those people not receive. We are not going back in time and letting Tom's say, you know what, we just won't sell the products at all, or we'll sell them, but only at a price that we get to dictate. The analysis here is asking, people bought these products, how much value did they get versus how much value that they didn't get.

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Q. But looking at just economic realities, are you aware of whether removing the "natural" claim would have had any impact on Tom's cost of manufacturing the product?

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24

25

A. I gave that some thought, and whether they write "natural" on the label or not doesn't change the cost of ingredients for

1 C. WEIR

2 toothpaste, it doesn't change the cost of the
3 tube for the toothpaste, it doesn't change the
4 cost of shipping that toothpaste to the
5 grocery store, it doesn't change the salary
6 that's paid to the cashier that swipes the
7 tube through the cash register. The change in
8 the labelling would not in any way
9 fundamentally alter the supply factors at
10 Tom's or the retailer, which is why we hold
11 those supply factors constant as between the
12 real world and the but-for world.

13 Q. So the cost to Tom's in
14 manufacturing it would stay the same if the
15 "natural" claim was removed. Are you
16 familiar -- have you reviewed Tom's profit
17 margins on the class items at issue, the
18 products at issue?

19 A. Perhaps; not recently.

20 Q. Okay. Are you relying on Tom's
21 profit margins for the products at issue as
22 part of your opinions in your report?

23 A. Decidedly not, for the reasons that
24 I just explained to you. A product can be
25 worth nothing even though the product cost

1 C. WEIR

2 money to manufacture and the manufacturer
3 would like the product to sell to cover those
4 costs. But it's routine that once products
5 are in existence, this is where we were
6 talking about the key point from the Stop &
7 Shop days, if the product exists, a retailer's
8 going to sell it for anything rather than
9 nothing. Nobody is going to let tubes of
10 Tom's expire on the shelf purposefully when
11 they could reduce the price and clear them
12 from the inventory.

13 And since we're dealing with
14 products that have already been made, already
15 been sold, and by definition had to have been
16 in class members' procession for them to
17 derive value, you have to model the fact that
18 the products are out there, and you can't let
19 there be a decision that says I would rather
20 make more money on this by trying to sell
21 fewer units or something like that, let's
22 pretend that some of the units didn't get
23 sold.

24 Q. Well, it's not even pretending,
25 though. I mean, are you familiar with the

1 C. WEIR

2 video record.

3 (Recess was taken.)

4 THE VIDEOGRAPHER: The time is
5 approximately 4:14. We are back on video
6 record.

7 BY MR. WEISBERG:

8 Q. All right, Mr. Weir. In paragraph
9 33 of your report, as we talked about, you say
10 you worked with Dr. Dennis to develop parts of
11 the conjoint surveys in this case, right?

12 A. And the modeling as we discussed
13 earlier today, but yes.

14 Q. And did you work with Dr. Dennis to
15 determine the specific attributes and levels
16 that were used in the conjoint survey?

17 A. Yes, as to price, and to ensure that
18 the challenged claims were in the survey. No,
19 as to the other elements.

20 Q. Okay. So attributes such as product
21 benefits and the different levels within
22 product benefits, you didn't have a role in
23 that?

24 A. I think his product benefits
25 includes the challenge claim. So yes, as to

1 C. WEIR

2 that element; no, as to the others.

3 Q. I mean, like Deep Clean or Advanced
4 Whitening for toothpaste, that was not --

5 A. That were Dr. Dennis' choices. I
6 don't have a beef with them, but those were
7 his choices.

8 Q. Why do you say you don't have a beef
9 with them?

10 A. Oh, I always imagine what a person
11 who isn't hearing it this live, what they
12 might think, and it's like, oh, Mr. Weir's
13 disclaiming the attributes, and I'm just
14 trying to tell you it was Dr. Dennis' choice;
15 not like I think he did a poor job or have a
16 negative connotation about the choices that he
17 made.

18 Q. I see. And have you critically
19 assessed the choices that he made and
20 thoroughly agree with them, or do you just, as
21 you sit here, have no reason to object to
22 them?

23 A. The latter. I was not asked to, you
24 know, look over his shoulder and approve of
25 the design. But there's nothing that I've

1 C. WEIR

2 seen in the design in reviewing his
3 declarations in this case that caused me to
4 worry about the design.

5 Q. I see. So in paragraph 34, your
6 report states that the respondents in the
7 toothpaste and deodorant conjoint surveys,
8 quote, "are representative of the Class, the
9 results of the survey are projectable to the
10 class, and the results of the survey provide a
11 reliable and accurate measurement of the
12 market price premium solely attributable to
13 the challenged Claim used by Tom's of Maine on
14 their Toothpaste Products."

15 Is that assertion based on any
16 analysis you performed, besides reviewing
17 Dr. Dennis' report?

18 A. I don't think I'm making the
19 assertion so much is that it's a recitation of
20 what Dr. Dennis has said. If you look at that
21 paragraph, all of the sentences are tied back
22 to citations to the Dennis report. And all
23 I'm trying to do here is, if somebody's
24 reading my report but hasn't read Dr. Dennis',
25 they're getting a flavor of what came from

1 C. WEIR

2 Dr. Dennis that is leading me to the
3 conclusions that I make later on.

4 Q. I see. So you're just reiterating
5 Dr. Dennis' assertions; you're not personally
6 endorsing them?

7 A. Yeah. In the same way that I just
8 mentioned, I don't want to come in and make it
9 sound like I have a disagreement with
10 Dr. Dennis. I have no reason to disagree with
11 him. But that's his statement, and I'm just
12 citing to him making that statement.

13 Q. Okay. Paragraph 42 of your report
14 says that you, quote, "worked closely with
15 Dr. Dennis to ensure that his surveys were
16 appropriately designed to measure the true
17 market value of the price premiums
18 attributable to the Claim."

19 How specifically did you do so?

20 A. I think we've covered that in our
21 conversations to date about real world
22 market-based prices, HB regression model,
23 market simulation, holding supply -- quantity
24 supply fixed as a matter of history, etcetera,
25 etcetera.

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2 going to do the percentage price premium that
3 we have discussed at length in other cases
4 when it was the first time and we had to think
5 about that, and the facts and circumstances
6 seemed like they mirror those other efforts
7 and, therefore, we're going to adopt that
8 method; yeah, sounds good; okay.

9 Q. And what specific application issues
10 did you discuss with Mr. Dennis?

11 A. Can you point to where you're
12 looking just so I can read what you're talking
13 about, please?

14 Q. Oh, sure. Back to paragraph 43, you
15 say you had several discussions with
16 Dr. Dennis "concerning the results of his
17 surveys and how they should be interpreted and
18 applied."

19 A. Okay. And now would you give me the
20 question one more time?

21 Q. Sure. What specific issues of
22 application or applying did you discuss with
23 Dr. Dennis?

24 A. Primarily that the percentage would
25 be applied back to the actual sales

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2 transactions so that we could account for what
3 I describe as the price of the pizza
4 difference. Namely, that some people pay
5 different amounts for these products, but if
6 they didn't get 10 percent of the pizza, it
7 doesn't matter whether you paid \$20 for the
8 pizza or \$12 for the pizza, you didn't get 10
9 percent of the value. And so the application
10 of that percentage to the price correctly
11 calculates damages and controls for and
12 obviates any issues that might arise from
13 variations in purchase prices.

14 Q. I see. So are you assuming that
15 even if someone in the class bought a product
16 that was already, say, 20 percent on sale,
17 just for some, you know, reason, manager's
18 special, it's your assumption that even under
19 that sales price, it would have been
20 12 percent to 21 percent less?

21 A. I've heard this argument before, and
22 I find it quite puzzling. Imagine there's a
23 20 percent sale, like your hypothetical. Why
24 on earth would that conceptually apply first
25 to a contested premium in a litigation and

1 C. WEIR

2 only then to other elements of the product?

3 The answer is: That wouldn't make any sense.

4 Instead, what you say is, here's the, like,

5 starting value of the product, we're going to

6 reduce it because we're putting it on sale,

7 you're still getting the same product, you're

8 still missing, in my pizza example, one slice

9 out of the ten, it's just that now the price

10 is lower. And so we account for those

11 transactions where people still didn't get 10

12 percent of the pizza, they still didn't get 12

13 or 21 percent of their toothpaste and

14 deodorant, but we would give fair credit to

15 Tom for the fact that -- Tom's for the fact

16 that the retailer did have a discount that

17 applied to the totality of the product.

18 Q. Is it your understanding that the

19 product -- or the market for toothpaste is an

20 ordinary market?

21 A. The way that I use that term, yes, I

22 would characterize the marketplace as

23 ordinary.

24 Q. And how do you characterize the term

25 "ordinary market"?

1 C. WEIR

2 A. I usually try and describe instead a
3 non-ordinary market to kind of illustrate.
4 But the classic example is prescription drugs.
5 If you're trying to figure out the price of
6 prescription drugs, that can be very
7 complicated because you could go into a store
8 and pay nothing because you have insurance
9 that covers the whole thing, or you might have
10 a co-pay, and each insurer is working in a
11 smoke-filled backroom to negotiate how those
12 payments will work. And if you -- I usually
13 try and avoid cases that would involve
14 something like that.

15 But the grocery store presents what
16 I would refer to as an ordinary market, and
17 it's sort of a take it or leave it. People
18 aren't going in, they're not negotiating the
19 price of Tom's toothpaste. The price is what
20 it is, and they buy or they don't buy. We all
21 know how the prices at the grocery store work.
22 To me, that makes it an ordinary market and
23 subject to the typical economic models of
24 price.

25 Q. And would you describe the market

1 C. WEIR

2 for deodorant in the same way?

3 A. Yes.

4 Q. And would you describe the market
5 for toothpaste and deodorant as efficient
6 market?

7 A. That sounds like you're talking
8 about like -- oh, yeah, so you're thinking
9 about fraud on the market and the cause of a
10 price premium. No, the price premium does not
11 rely on a fraud-on-the-market price principle
12 in an efficient market. It relies on the
13 principle of product differentiation, which is
14 that products that are literally different,
15 which implies that there can be competition,
16 but not perfect competition, that those
17 products can sell for different prices
18 precisely because of the differentiation. So
19 the price premium here does not rely on market
20 efficiency. It relies on the fact that
21 products are differentiated, and that allows
22 for different products to sell for more and
23 less.

24 Q. So paragraph 38 of your report
25 states that Dr. Dennis considered supply-side

1 C. WEIR

2 Q. And are you aware -- well, let me
3 ask: Are there any other macroeconomic
4 factors that you're referring to besides
5 inflation?

6 A. I mean, it could be anything.
7 Consumer sentiment could change, GDP could
8 change, all those things. If you're going to
9 be something that is temporally apples to
10 oranges, must be controlled for, unlike in the
11 situation where Dr. Dennis and I are running a
12 comparison that is temporally apple to apples
13 where I can hold those factors constant.

14 Q. Did you hold them constant, or did
15 you just assume that they would remain
16 constant?

17 A. I have held them constant. It's the
18 but-for construct again. If you want to
19 answer the question of what is the effect of
20 removing the "natural" label, you couldn't run
21 a but-for world where you introduce inflation.
22 It wouldn't make sense. You'd have a result
23 that's a blend of those two impacts. So
24 again, we use the economy exactly as it
25 existed and as it impacted things in the real

1 C. WEIR

2 world, and we hold that constant in the
3 but-for world.

4 Q. Are you aware of the inflation rate
5 that was prevailing in the national economy at
6 the time that the label changes occurred?

7 A. I don't have the inflation rates in
8 any given month memorized. I'm aware that
9 recently inflation has gone up, and I use that
10 as an example when you asked me, could you
11 conceive of a macroeconomic factor that would
12 need to be controlled for.

13 But even imagine that it wasn't as
14 big of a change as it is now. It was 2.3
15 instead of 2.6 in the particular time period.
16 You still have to control for that, because we
17 would expect, all else equal, that if the
18 inflation went up even by .3 percent, that the
19 price of Tom's would go up .3 percent. So
20 when it stays the same, that's the same as
21 being able to say, if you controlled for
22 inflation pushing the price up, then the label
23 claim going away has a downward impact on the
24 price in order to hold the price constant.
25 But if you don't do the analysis and control

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for those things, which, by the way, is very, very challenging to do correctly, which is why it's not a method that I would recommend, you can't get a result that isolates the impact of the harmful conduct from everything else.

Q. Well, your damages model posits that without the "natural" claim, holding everything else constant, Tom's would have received 21 percent -- actually, slightly more than 21 percent less for the deodorant product at issue, correct?

A. I'm not talking really about what Tom's would obtain so much as that consumers did not receive 21 percent of the value they were promised, when we're talking about deodorant.

Q. Your report says that the market price for the deodorant product at issue would have been 21.25 percent less had Tom's not included the "natural" claim on the product, correct?

A. That's the retail price of the product, yes.

Q. Okay. And if the market price,

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after the label is -- the "natural" claim is removed, actually stays the same and you have 2 percent maybe you attribute to inflation, where is the other 18.5 percent coming from? Where is the rest?

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A. You can't ask me to do what would otherwise be weeks worth of analysis in the last hour of this deposition. But what I can tell you is that there are many, many, many potential factors, including other changes to the label and all the things that you've been quizzing me about when you're thinking about a forward analysis, such as the behavior of competition, the behavior of competitors. All of these other things, when you're not comparing time period A to the same time period like Dr. Dennis and I are, you now have additional requirements for what you must control for in the analysis.

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Q. So is it your testimony that it doesn't change your confidence in the price premium of 21.25 percent for deodorant and 12.33 percent for toothpaste, that after the "natural" claim was removed, the prices -- the

1 C. WEIR

2 retail prices for those products did not fall
3 at all, let alone to the extent predicted
4 under your conjoint analysis?

5 A. Because of all of those confounding
6 factors, it does not bother me one bit. That
7 analysis, that before and after, is junk. It
8 cannot tell you or inform as to the
9 reliability of the real price premium in this
10 case, if all you do is compare the price
11 before and after without any of the controls
12 for confounding factors.

13 Q. Other than inflation, what
14 confounding factors are you aware of that you
15 believe undermine the validity of that before
16 and after analysis?

17 A. I haven't done all of the work
18 required to figure that out, but I've already
19 given you some examples. Competition could
20 change, products could be added or subtracted
21 from the marketplace, retailers could change,
22 other behaviors, GDP or other macroeconomic
23 events could take place or change. All of
24 those things have to be controlled for when
25 you do a time period A to time period B

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analysis, as that before and after is trying to do, unlike when you do time period A versus time period A the way Dr. Dennis and I do, which allows us to hold those factors constant across the analysis.

Q. Are you aware of any changes in competition involving the Tom's product at issue in this case that occurred at the time of the labelling change?

A. I haven't sought to analyze that because the method that you're quizzing me about, I would never, in a million years, sponsor for this.

Q. And so I take it you also haven't looked into whether any products were added or subtracted for the marketplace at the time of the Tom's labelling change?

A. What I can tell you is that your team that came up with this comparison haven't investigated that at all, and they have made no controls, big or small, for any factor such as that.

Q. I see. So you're saying that our team should have looked into all of these to

1 C. WEIR

2 retail prices for the Tom's products at issue
3 in this case changed before and after the
4 labelling changes occurred?

5 A. Because that is of no probative
6 value to the price premium that people paid as
7 a result of the challenged conduct in this
8 case, I did not look into that.

9 Q. Okay. Now, in section 7 of your
10 report paragraph -- I'm almost done, I just
11 want to make sure I understand this last
12 section. So in paragraph 54 to 56 and tables
13 1 and 2, those summarize data produced in this
14 litigation, right?

15 A. Section 6 is a summary of the sales
16 data that has been produced in the case, yes,
17 for the class products and class period.

18 Q. Okay. And then in section 7, can
19 you please explain to me what you're doing in
20 paragraphs 57 to 61 and tables 3 and 4 of your
21 report?

22 A. I am calculating price premium
23 damages that I believe should be awarded to
24 plaintiffs, should plaintiffs prevail on the
25 merits of their case.

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Q. So to calculate those damages, you're taking the dollar sales figures that were produced in this litigation and you're multiplying them by the price premium from Dr. Dennis' report?

A. There's a lot of work that we do before we get to section 7, including evaluating the theory of liability, determining the correct framework for the calculation of damages, designing and conducting the conjoint analysis, reviewing and analyzing voluminous sales data to correctly estimate the sales at issue that are used as an input in the calculation, determining that the price premium factor and those sales are the correct inputs to the calculation.

But you are correct that the final analysis is the product of the dollar sales and the price premium.

Q. And it's that final analysis, the product of the dollar sales and the price premium, that's what's happening in paragraphs 57 to 61 and table 3 and 4, correct?

1 C. WEIR

2 A. The calculations happened in a
3 spreadsheet someplace. Section 7 does present
4 the results after having done all the work
5 that I just described in my prior answer that
6 gets us to the results in tables 3 and 4.

7 Q. And then can you explain to me what
8 you're doing in paragraphs 62 to 64 and table 5?

9 A. That presents the understanding that
10 I have derived from conversations with counsel
11 about New York GBL statutory damages, and
12 based upon that understanding that has been
13 provided to me, I set forth the calculation of
14 those damages in table 5.

15 Q. So you take the number of units sold
16 based on the figures produced in this
17 litigation, and then you multiply them by 50
18 or \$500 per unit, and then you add up your
19 total statutory damages?

20 A. I don't know that there's addition
21 going on in the calculation, but -- and again,
22 I'm going to affirm that I'm not a lawyer, nor
23 opining as to the propriety one way or the
24 other of the calculation, but I've been led to
25 believe that statutory damages are the product

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2 of the violations, where violation would
3 constitute a unit of product sold, and the
4 statutory remedy of either 50, 500, or both,
5 in terms of the statutory damage amount.

6 MR. WEISBERG: Okay. I have no
7 further questions for the witness.

8 MS. WESTCOT: I don't have any
9 questions for you, Mr. Weir. Thank you
10 for your time today.

11 THE WITNESS: I'd like to take a
12 moment to thank Kristi and Mike for their
13 service today. We couldn't do it without
14 you.

15 I'm going to reserve my right to
16 read and sign the transcript.

17 THE VIDEOGRAPHER: I appreciate
18 that. Thank you so much.

19 Counsel, would you like me to sign
20 off?

21 MR. WEISBERG: Yeah, we'll go off
22 the record.

23 THE VIDEOGRAPHER: Okay. The time
24 is 5:39, we're going off the video record.

25 (Time noted: 5:39 p.m. Eastern.)

C E R T I F I C A T E

STATE OF NEW YORK)

) SS.:

COUNTY OF SUFFOLK)

I, KRISTI CRUZ, a Notary Public
within and for the State of New York, do
hereby certify:

That the witness whose deposition
is hereinbefore set forth, was duly
sworn by me and that such deposition is
a true record of the testimony given by
such witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage; and that I
am in no way interested in the outcome
of this matter.

IN WITNESS WHEREOF, I have
hereunto set my hand this 16th day of
September 2022.



KRISTI CRUZ